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# The Planner in Action: China's Influence as a Developing and Non-Market Economy on the WTO

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# The Planner in Action: China's Influence as a Developing and Non-Market Economy on the WTO

## **Abstract**

Chinese accession to the World Trade Organization in 2001 forever altered the international economy as it marked the political-economic diversification of international trade negotiations and law. Before the implications of Chinese accession became apparent, scholars predicted that Chinese WTO membership would greatly affect the Organization. While this thesis agrees with this general sentiment, it insists that China's effect on the WTO is not wholly negative or positive and requires a nuanced, sub-institutional assessment to understand. Qualifying and expanding upon scholars' pre-2001 predictions, this thesis argues that for the most part, China did not proactively cause instances of institutional weakness and organizational ineffectuality. Rather, China's behavior within the WTO illuminates the Organization's inherent inability to handle political-economic diversity. Further, this thesis argues that the original dispute settlement rules and procedures created to handle China no longer apply uniformly to the Chinese economic situation. China exists in a liminal space between socialism and capitalism, and the WTO is still unable to fully and adequately handle this political-economic ambiguity.

## **Keywords**

international trade, World Trade Organization, China, Non-Market Economy, dispute settlement, Doha Round, international law, marketization, hybrid economy, Social Sciences, Political Science, Ellen Kennedy, Kennedy, Ellen

## **Disciplines**

Asian Studies | Comparative and Foreign Law | International Economics | International Law | International Relations | International Trade Law | Law and Economics | Law and Politics | Political Economy

The Planner in Action:  
China's Influence as a Developing and Non-Market Economy on the WTO

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Senior Honors Thesis in Political Science  
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**ABSTRACT**

Chinese accession to the World Trade Organization in 2001 forever altered the international economy as it marked the political-economic diversification of international trade negotiations and law. Before the implications of Chinese accession became apparent, scholars predicted that Chinese WTO membership would greatly affect the Organization. While this thesis agrees with this general sentiment, it insists that China's effect on the WTO is not wholly negative or positive and requires a nuanced, sub-institutional assessment to understand. Qualifying and expanding upon scholars' pre-2001 predictions, this thesis argues that for the most part, China did not proactively cause instances of institutional weakness and organizational ineffectuality. Rather, China's behavior within the WTO illuminates the Organization's inherent inability to handle political-economic diversity. Further, this thesis argues that the original dispute settlement rules and procedures created to handle China no longer apply uniformly to the Chinese economic situation. China exists in a liminal space between socialism and capitalism, and the WTO is still unable to fully and adequately handle this political-economic ambiguity.

## SECTION I: INTRODUCTION

In the wake of the Second World War, the forty-four Allies met to construct new international economic, financial, and monetary institutions to facilitate globalization and maintain peaceful economic interdependence between nations.<sup>1</sup> At this conference in Bretton Woods, New Hampshire, the delegates founded the World Bank, the International Monetary Fund (IMF), and the General Agreement on Tariffs and Trade (GATT). The World Bank would serve as a creditor to developing countries seeking to spend on infrastructure and poverty alleviation programs.<sup>2</sup> The IMF would both lend to member countries and monitor global exchange rates (which were fixed to the U.S. dollar which was valued absolutely in terms of gold).<sup>3</sup> Last, the GATT, now espoused by the World Trade Organization (WTO), was originally founded to facilitate “rounds” of multilateral trade negotiations, to orchestrate multilateral tariff reduction initiatives, and to ensure non-discriminatory trade between nations.<sup>4</sup>

Scholars of international relations tend to agree that the Bretton Woods system was pushed and shaped most by the United States, the hegemonic superpower at the time, to establish a postwar era of international relations that would serve its own interests first and foremost.<sup>5</sup> Though the United States led the charge, other major Allied powers such as Canada, the United Kingdom, and France joined the U.S. as the key players in the GATT’s construction.<sup>6</sup> The rationale behind the GATT relied on neoliberal theories that economic interdependence deters countries from fighting each other.<sup>7</sup> The Allies fashioned the GATT to lower tariffs (and thus increase trade flows and interdependence) in order to mitigate the possibility of another world war. Other than the major powers themselves, most of the twenty-three original GATT signatories were former colonies, imminently independent nations, or current but largely autonomous colonies of the signing Powers.<sup>8</sup> As the neoliberal theory maintains, international

trade is the fundamental component of economic interdependence.<sup>1</sup> It would seem, then, that the non-power signatories to the GATT joined the agreement for the following potential reasons 1) as the result of bilateral negotiations with their colonizers over economic resources in flux or 2) as proactive attempt to maintain economic ties with their powerful colonizers while becoming de jure independent.

China stands out as a unique GATT signatory within the framework discussed above, as China withdrew from negotiations in 1949 upon the establishment of the communist People's Republic of China (PRC).<sup>9</sup> To be sure, Cuba also joined the original GATT and has remained an adherent to the treaty despite its own non-capitalist nature.<sup>10</sup> However, the conditions in which Cuba joined seem less idiosyncratic than China's, as Cuba is a former colony of the United States and maintained extremely close economic and political relations with the United States until the Cuban Revolution in 1959.<sup>11</sup> Further, despite Cuba's planned economy, the major WTO members do not allot Cuba the second-class status for this as they give China, probably because Cuban planning has little macroeconomic consequence for the powerful WTO members.<sup>12</sup> This dynamic hints at the fundamentally political nature of non-market economy (NME) designations. Still, the prominence, international trade practices, and socialism of China, however, tell a completely different story.

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<sup>1</sup> The original GATT signatories were as follows: "The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America." Of these, Burma and Ceylon (Sri Lanka) gained independence from the U.K. in 1948 and India and Pakistan became independent in 1947. Southern Rhodesia (Zimbabwe) and South Africa remained under the official auspices of the United Kingdom until 1980 and 1961 respectively. Lebanon and Syria gained independence from France in 1943 and 1946 respectively (independence information from the CIA Factbook).



History shows a clear relationship between protectionist trade policies and socialism. Karl Kautsky noted that free trade, historically, served as the defining characteristic of full-blown capitalism.<sup>13</sup> He emphasized the importance of protecting poor individuals and entire poor countries from becoming suspended in proletarianism through the proliferation of international trade.<sup>14</sup> Just as the division of labor led to greater economic wellbeing of internal industrial sectors vis-a-vis agricultural sectors, the international “division of labor,” a.k.a, comparative advantage in trade would allow capital intensive, industrialized economies to prevail over agrarian-based economies. In the historical view of those trading with a planning economy, there were (and still are) equally compelling reasons to be skeptical of liberalized trade. In the year that China rescinded initial GATT membership, Bert Hoselitz asserted that “theory and practice of national economic planning agree that the exchange of goods and services between a planned economy and the outside world must be carried out by a state trading monopoly or by bulk-purchase agreements.”<sup>15</sup> In a contemporary context, in which most goods and services are exported to some extent to other countries, nationalized monopolies would control the entire spread of consumer goods and services. A monopoly is not subject to competition, and thus market-based prices, from other firms, and can establish the domestic “normal value,” to use WTO language of its product without much contention.<sup>16</sup> This would make it difficult to penalize a planning economy for pricing and trading practices, as they could be both discriminatory and simply indicative of its inorganic economic situation.

It follows that an influential socialist economy in the GATT/WTO would both be paradoxical and deleterious to the institution’s goals. In this vein, aside from the establishment of the WTO itself, China’s re-accession in November 2001 was the most significant event in the history of the institutionalized international trading system.<sup>17</sup> China joined the WTO after fifteen

years of arduous negotiations and its accession was unlike that of any other WTO member at that time.<sup>18</sup> Two conditions to the China Accession Protocol are particularly interesting, as they run counter to the WTO's purpose to facilitate cooperation between capitalist markets, or market economies, for further trade liberalization. First, China allowed countries to label it a "non-market economy" (NME) until 2016 for the purposes of anti-dumping (AD) investigations and indefinitely for countervailing duty (CVD) cases.<sup>19</sup> Second, China acquiesced to demands for a specific "China Safeguard," or a duty on Chinese goods that countries could institute to limit importation until 2013.<sup>20</sup> While the China Safeguard is now obsolete, special dumping margins and subsidy levels using NME methodology still aim to protect importing countries from Chinese attempts to gain an unfair state-driven trading advantage, or as some may argue, from fair Chinese export oriented policies.

NME status offers countries significant freedom in determining dumping margins. Further, the China Safeguard was a country-specific tariff and therefore undermined the WTO's "Most Favored Nation" (MFN) law, which asserts that a country must award the lowest tariff levels it gives to one country to all countries.<sup>21</sup> These provisions clearly conflict with core objectives of the General Agreement of Tariffs and Trade (GATT), now espoused by and synonymous with the WTO. While much literature exists describing the accession process' affect on the politics and political economy of China internally, less has been written about the effect of China's unique behavior and legal treatment (and legal treatment of the NMEs in general) on the WTO's institutions, diplomatic goals, and perceived responsibilities.

This paper attempts to bridge some of the gaps in scholarship. Specifically, this thesis explores the following questions:

1. How has the accession and participation of China, both as a “non-market economy” and as its own unique force, affected the institutions, functionality, diplomatic initiatives, and legal culture of the WTO?
2. What can one learn about the WTO’s structural integrity and future topics of interest to WTO members from NME participation?

These multidimensional questions are intellectually and politically interesting for a number of reasons. The GATT/WTO serves as a mechanism for countries to negotiate lower tariffs and to eradicate technical barriers to trade. The elimination of these policies further connects and marketizes the international economy. Even before the establishment of the WTO, Russian scholars argued that the quintessential embodiment and synthesis of “the world capitalist economy” would be an organization devoted to trade liberalization.<sup>22</sup> Naturally, then, non-capitalist countries kept their distance from the GATT until the end of the Cold War. China’s re-joining in 2001, followed by Viet Nam’s inclusion in 2007 and Russia’s in 2012, marked a major trend of political-economic diversification of WTO membership.<sup>23</sup> This paper explores how the WTO understands and has handled this diversification, despite said diversification running contradictory to the WTO’s established structure.

## SECTION II: PURPOSE AND ORGANIZATION OF THIS THESIS

In 2002, Robert Keohane argued that, “among international organizations, the WTO stands out as having quite authoritative and precise rules and a relatively good record of eventual compliance with those rules by governments.”<sup>24</sup> Even with the increased participation of non-market economies, the WTO remains the most respected international organization in terms of

compliance with rulings in disputes and regarding members state recognition of its institutional importance. Through 2007, member countries had complied with “virtually all” of the rulings compelling them to revise behaviors or domestic statutes to ensure adherence with WTO rules and commitments.<sup>25</sup> By 2015, the WTO dispute settlement system had released 460 rulings, and “almost all” of these rulings have still resulted in members’ WTO-consistent modification of practices.<sup>26</sup> Further, countries respect the jurisprudential and interpretive methods inherent to the WTO system and have, in certain cases, both integrated such methods into domestic legal practice and into bilateral and regional investment arbitral systems.<sup>27</sup>

One problem that this thesis examines in its section on dispute settlement is not whether compliance with or respect for the rules or use of institutions has decreased but whether these rules and legal methods themselves have become less “precise,” and “authoritative.” In other words, one can easily follow the rules if the rules provide for eclectic and divergent interpretations, as well as room to half-comply. Section II explains the technical and legal terms addressed in this paper in greater depth. The most important and/or controversial of these terms include: non-market economy (NME), market injury vs. disruption, and state owned enterprise vs. “public body.” In fact, this thesis argues that NME and public body definitions, as permitted and left un-synthesized by the WTO legal system, undermine the WTO rules based system.

Section III introduces the theories of Chinese influence on the WTO hypothesized by two prominent international trade scholars — John Jackson and Deborah Z. Cass — and explores the extent to which these theories materialized according to existing literature. Section IV serves as a continued review of this existing literature and delves into the documented theories of China’s (and other NMEs’) participation in the WTO. Section V details the interview process, methodological considerations taken in original analysis of disputes and party submissions.

Additionally, Section V details the marketization analysis conducted in the later section on dispute settlement and NME methods for calculating dumping margins. Also included in Section V is a list of the original interview questions. Section VI presents the findings from this economic and legal research and synthesizes it with existent scholarship and interview commentary. The findings section also discusses China's influence on less tangible aspects of the WTO system, such its Eurocentric foundations and perceived legitimacy, the way in which countries prepare to join it, and what the international community considers to be issues within its purview. Section VII explains the relevance of this analysis and offers new ideas about the implications of potential NME methodology expiration in December of 2016. Section VIII concludes.

### SECTION III: POLITICAL-ECONOMIC TERMS, TRADE JARGON AND THE COMPLICATIONS OF NME CLASSIFICATION

Before delving into terms specific to this thesis project, it is important to understand the basic types of “trade remedies” and accompanying dispute settlement cases that arise within the WTO system. The two main types of “trade remedies” are anti-dumping duties (AD) and countervailing duties (CVD). An importing country can initiate an AD investigation against an exporter when it believes that a good has been “dumped” — underpriced in the importing country vis-à-vis the domestic markets of the exporter — thereby causing injury to domestic producers of the good in the importing country.<sup>28</sup> As the WTO explains, determining the extent to which a product was dumped (the “dumping margin”) requires highly technical and convoluted data about the markets, exchange rates, and product prices in the relevant countries.<sup>29</sup> It becomes even more difficult to obtain market data from NMEs (like China) where the country

is largely marketized but certain firms, industries, or even entire regions determine prices through government planning.<sup>30</sup> Conversely, accurate and comprehensive price data is equally difficult to find when most of a country (for example, Viet Nam) operates under “non-market economy” conditions but some small, individual firms price according to market trends.<sup>31</sup>

China contains a significant number of exporting state-owned enterprises (SOEs) and can keep their outward prices artificially low through subsidies or equivalent mechanisms.<sup>32</sup> Countervailing duties are the trade remedy tool used to mitigate the effects of government subsidization. If a country provides “prohibited subsidies” —financial support for exporting firms or for “domestic over imported goods” — WTO members can impose an additional charge when importing the foreign goods in question.<sup>33</sup> Further, many countries accuse China of devaluing its currency to make its exports more competitive in the international marketplace. This mechanism is not directly supervised and regulated by the WTO, but hypothetically, import safeguards, such as the China Safeguard, could offset the effects of a currency-related boom of goods coming from China. At their core, AD duties, CVDs, and import safeguards all attempt to fix the same problem; all aim to make it more expensive from domestic firms to import foreign goods from countries attempting to gain unfair trade advantages. The economic policy mechanisms that may be employed by planning governments (such as subsidization of SOEs, currency manipulation, and artificially low export pricing, the last of which could be employed by any country, NME or not) all have the same effects in international trade as dumping strategies employed by independent, market-operating firms. The difficulty in determining both a) whether the source of the market disruption is a government decision or not and b) the extent

to which each of the aforementioned policy mechanisms is responsible for a cumulative injury to a foreign market is amplified in cases involving planned or semi-planned economies.<sup>2</sup>

Though this paper explores “non-market economies”’ effect on WTO institutions and legal functions, it cannot holistically or unequivocally define China as a “NMEs” nor can it treat “NME” as a monolithic term. Within this definitional ambiguity and diversity in bilateral NME treatment arises the first, and perhaps least explored, problem posed by non-capitalistic country involvement in the WTO. Over 30 WTO member countries already grant China de jure “market-economy status” (MES), but the United States and the EU — arguably the two most powerful and sophisticated entities in dispute settlement — have not granted China this label.<sup>34</sup> As explained below, complexities in defining “non-market economy” contribute to this largely arbitrary and political designation, and may affect the extent to which NME status is, in practice, used effectively or even enforceable at all.

This thesis uses the terms “market economy” and “capitalist economy” interchangeably, and a discussion of the reasoning behind this choice, for a topic involving international economics and the WTO in particular, is warranted. Harvard economist Bruce Scott presents a comprehensive definition of capitalism as “an economic system where private actors are allowed to own and control the use of property in accord with their own interests, and where the invisible hand of the pricing mechanism coordinates supply and demand in markets in a way that is automatically in the best interests of society.”<sup>35</sup> He then explains his own paper’s description of capitalism as a category of political-economic organization, writing:

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<sup>2</sup> The notorious “double remedies” case, initiated by China in 2008 and concluded in 2011, focuses on the problem of imposing simultaneous AD duties and CVDs on industries in non-market economies. Difficulties arise in parsing out dumping actions and subsidy effects from an SOE because, to some extent, government subsidization of industry is an inherent characteristic of NME and because an NME can subsidize an SOE while that SOE is also dumping.

“Capitalism...[is] a system of indirect governance for economic relationships, where all markets exist within institutional frameworks that are provided by political authorities, i.e. governments...capitalism is a three level system much like any organized sports. Markets occupy the first level, where the competition takes place; the institutional foundations that underpin those markets are the second; and the political authority that administers the system is the third.”<sup>36</sup>

These two definitions offered by Scott suggest that there is more to a capitalist economy than the determination of prices based on market forces of supply and demand. However, the determination of prices based on such market forces is an inseparable feature of a capitalist economy. A market economy is not always a full-blown capitalist economy, but a capitalist system always has market economy. That said, for the sake of trade remedies cases, pricing based on supply and demand is all that matters. The political institutions inherent to a capitalist country are irrelevant when considering whether or not a state (or a customs union, in the case of the E.U.) economy is market-based by the standards of the WTO. In the words of one interviewee, “the WTO is not a club of democracies” and “the political character of the members...is not relevant.”<sup>37</sup> When discussing the “global capitalist economy,” this thesis focuses on just that: the economy. Countries, and an international system like the WTO, are referred to as capitalist if they are market-based, regardless of their espousal (or rejection) of the political or governmental components of a comprehensive definition of capitalism.

Scott does not argue that government regulation of the economy disqualifies a country from capitalist classification. In fact, he considers that reception of the capitalist label requires the existence of effective government management of and support for the evolution of the country’s markets.<sup>38</sup> Still, a strict textual analysis of Scott’s definitions suggests that even Western European countries and the United States cannot even be considered fully capitalist or marketized economies as not all markets in these countries exist in a “system of indirect governance” by political officials.<sup>39</sup> In a pure capitalist economy, the only goods provided (and



thus only markets controlled) by the government are “public goods such as national defense” and internal law and order.<sup>40</sup> More flexible and realistic definitions of pure capitalism would include “basic education” as a public good administered by the government in such an economy.<sup>41</sup> No country on earth meets these strict qualifications for capitalism/marketization, as even in highly capitalist economies such as that of the U.S., for example, the government controls the allocation of certain goods, such as food and housing, through welfare programs. The United States also subsidizes its exporting producers of agricultural products, which, in the international economic context, means it tampers with pure markets as well. To be sure, neither China nor Viet Nam maintain economies in which prices are as determined by supply and demand as they are in the West. Precise classification of China, Viet Nam, or any other country is somewhat qualitative and subjective, as no pure nonmarket economy or pure market economy exists and thus all countries in the WTO fall somewhere on market economy-NME spectrum. This thesis’ exploration of this problem of the spectrum supports the argument that “NME” is just as political (if not more political) of a label as it is a legitimate economic one.

Regardless of varying nuances in definition, the purpose of non-market classifications remains the same: to clarify that “domestic prices cannot be used as a reference point” in trade remedy cases because the prices are affected by government subsidization, government price setting, or excessive currency manipulation.<sup>42</sup> Since this paper considers how the participation of China (and Viet Nam) influenced applied definitions of NME, this section details the defined components of a “non-market economy” according to trade law before 2001. The first multilateral insinuation that an economy exhibiting non-market characteristics could participate in the institutionalized international trading system came in an Interpretive Note to the GATT added by Czechoslovakia during a 1954-1955 review of the treaty.<sup>43</sup> Wolfrum et al. (2008)

unpack the note and determine that it contains “three essential criteria” recognized as hindrances to non-discriminatory, liberalized international trade.<sup>44</sup> According to the Note text and as reiterated by Wolfrum et al., the criteria are as follows:

1. “A country which has a complete or substantially complete monopoly of its trade”
2. “All domestic prices are fixed by the State”
3. “A strict comparison with domestic prices in such a country may not always be appropriate.”<sup>45</sup>

Before beginning a more in-depth analysis of the Note, it is interesting to mention that scholarship disagrees on myriad aspects of the Note’s language, even including the meaning of the word “comparison.” Wolfrum et al. assume that this refers to a comparison struck between domestic prices in a foreign economy and export prices of that same economy.<sup>46</sup> Thorstensen et al, however, argues that this language refers to “price comparability between market and centrally planned economies.”<sup>47</sup> Though Wolfrum’s side appears to be correct considering the methodology of calculating dumping margins, this ambiguity raises an important philosophical point. Who is to say that the prices of one country and another country, regardless of those countries’ political economies, should be comparable? Are differing prices simply indicative of a monopolistically competitive international market? Most importantly, should engagement in the competitive pricing that underpins a “global capitalist economy” be denied to countries that, internally, subvert the political and governmental components of capitalism?

The Interpretive Note lacks concrete methods for handling this puzzle of non-comparability.<sup>48</sup> In his the analysis of these provisions, Wolfrum argues that for “special difficulties” to arise in an attempt to compare domestic and export prices to detect dumping, the third criterion must (rather than may) be fulfilled. In other words, countries can possess

characteristics 1 and 2 without possessing characteristic 3.<sup>49</sup> There are two possible utilitarian interpretations of this dynamic: 1) a country cannot qualify as this embryonic form of NME for the purposes of AD cases without possessing all three traits or 2) a country need only fulfill criterion 3. Like post-2001 NME classification, the Interpretive Note intended to provide the (abstract) opportunity for AD cases to function without direct export/domestic price comparison. It is the implementable *end* (non-price comparability) not the descriptive means (criteria 1 and 2) that matter in the Interpretive Note. In this primitive definition, attention to constructing an eventual toolkit to *handle* NMEs in the WTO is evident; however, there seems to be less concern for requiring certain nuanced and internal political-economic characteristics to distinguish some economies, in practice, from economies that meet some nebulous and conceptual capitalist benchmark. The lack of adamantly required characteristics for NME status, in the rhetorical sense, allows for the possibility that future hybrid countries (enter China) could fill a liminal space in which NME status is ill-fitting but still the only non-capitalist option.

The agreement establishing the WTO did not include a definition of non-market economy or even the direct mention of such a term, even though Chinese accession negotiations were well underway.<sup>50</sup> In a 1984 Department of Commerce trade remedy case involving wire-rod from Czechoslovakia, USDOC defined a non-market economy as one in which planning rather than market forces determine the allocation of resources.<sup>51</sup> In the most comprehensive US definition of NME provided by the Department of State, the Soviet Union is listed as the prime historical example.<sup>52</sup> This entry in State's Glossary of Trade insists that an NME's government touches all corners of the economy: "production targets, prices, costs, investment allocations, raw materials, labor, international trade, *and* most other economic aggregates."<sup>53</sup> The U.S. Code criteria for a non-market economy generally follow the Department of State criteria. The major U.S. laws that

deal with comparable price determinations from non-market economies determine NMEs to exist according to “the extent to which” government intervention exists (the positive existence and magnitude of socialistic factors), rather than the extent to which it is absent.<sup>54</sup> The U.S. laws suggest that an NME government must intervene in all of the aforementioned economic arenas. However, the state could intervene in some of those arenas to a miniscule degree and still qualify as an NME.

The European Union does not have “a clear definition of NME” based on existing economic characteristics, but rather maintains a list of non-WTO members deemed to be non-capitalist.<sup>55</sup> Unlike the U.S., the EU understands market economies through an extensive test that considers the positive existence of *capitalistic* factors.<sup>56</sup> In the U.S. case, it is difficult to establish the maximum quantifiable level or type of government intervention that bars a country from non-market economy classification. Since the U.S. definition offers no quantifiable benchmarks, there is room for the U.S. to grant NME status to an ambiguous or mostly marketized country. Certainly, the lack of quantifiable benchmarks facilitates the fact that the U.S. is still able to label China as an NME.

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<sup>3</sup> To determine whether or not a country operates a “non-market economy,” the EU establishes a list of five political-economic factors in Article 2(7) of its Basic Anti-Dumping Regulation. The criteria are as follows: “A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if: 1) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labor, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values, 2) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes, 3) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts, 4) the firms concerned are subject to bankruptcy *and* property laws which guarantee legal certainty and stability for the operation of firms, and 5) exchange rate conversions are carried out at the market rate” (Official Journal of the European Union, Council Regulation (EC) No. 1225/2009 of 30 November 2009).

In U.S. law, after already receiving the NME classification, the label is harder to shake. But in E.U. law, the issue is not shedding NME status but rather exhibiting elements of capitalism. The E.U. law pinpoints NMEs by process of elimination, or in other words by clarifying which countries exhibit capitalist characteristics and then placing all other countries in the NME basket. The E.U. definition does not provide quantifiable benchmarks nor include the phrase “the extent to which.” Though these EU provisions do not mention China or Viet Nam as NMEs, the EU still treats these countries as such based on the guidelines in their particular accession protocols.<sup>57</sup> However, Chinese NME status for antidumping purposes is up for reevaluation at the end of 2016. The E.U. law, based on the un-quantified existence of capitalistic factors rather than the equally qualitative extent to which a government intervenes, may prove beneficial for China, since China does exhibit some capitalist factors but still retains significant government intervention.

In fact, Argentina and other countries that have already granted market economy status to China use, verbatim, the same checklist used by the EU.<sup>58</sup> Unlike the EU’s criteria, Argentina’s checklist notes that the list of factors “is not exhaustive, and the implementing authority may request such other evidence as it deems relevant.”<sup>59</sup> That said, this phenomenon supports the idea that it is and will likely be easier for China to shed E.U.-based NME classifications than the U.S. classification. That countries granting China MES and countries maintaining China’s NME classification use the same NME criteria supports this thesis’ argument that NME status is a political statement more so than a technically accurate economic safeguard.

As the Swedish National Board of Trade argues, many of these definitions were established during an era in which “there was a clear divide between economies following the ideas of market-based economics and those which followed the idea of central planning.”<sup>60</sup>

Thorstensen et al. (2013) note that the Working Party Report on the Accession of China designates China as a “Socialist Market Economy” that “bears characteristics of both market and non-market economies.”<sup>61</sup> Despite this sophisticated Working Party argument, the Department of Commerce and most other WTO member government’s agencies only allow for two possible classifications, market economy or non-market economy, for trade remedies purposes.<sup>62</sup> As explored in the literature and expounded upon in the findings, this thesis shows why this established binary causes trouble for certain members (particularly the NMEs themselves) and for actual WTO institutions.<sup>63</sup> At least in practice in the international trading context, rigid political-economic definitions no longer exist, and thus, this binary could undermine the legal accuracy and general rules-based nature of the dispute system, which remains the most prized component of the WTO.

For import measures and AD/CVD cases brought before the WTO dispute settlement body (DSB), complainants must show that “rapidly” increasing importation (“either absolutely or relatively”) of the defendants underpriced products are and have been “a significant cause of material injury” to domestic markets.<sup>64</sup> Injury, according to the WTO, occurs when there has been “significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member” and this serves to “depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.”<sup>65</sup> Material injury of a domestic market contrasts with market “disruption,” which occurs either when a material injury is present or when the “*threat* of material injury” arises.<sup>66</sup> This definition is specifically used to legitimate the use of the China Safeguard and is stipulated in the Protocol on the Accession of the People’s Republic of China.<sup>67</sup> The loose concept of threat is a tenuous requirement that undermines the rules-based system, as is discussed in the literature review.

However, this thesis does not offer additional analysis of the “threat” provision, as it has been explored quite a bit. Its mention serves as another piece of evidence towards the consideration that allowing China entry into the WTO led to a series of legally shaky and controversial rules.

Since Chinese participation undoubtedly affected the definitions of state-owned enterprise (SOE) and public body used in WTO dispute settlement, detailed here are the definitions of these entities that existed in the WTO context before Chinese participation affected the definition. As will be explained in the findings section, both arguments from the parties and the panelists in relevant trade remedies cases against China contributed to a more sophisticated and workable, or perhaps a more convoluted, definition of “public body.” This thesis provides original analysis of the relevant WTO jurisprudence to determine how and why certain WTO define “public body” differently. The WTO Agreement on Subsidies and Countervailing Measures (SCM), Article 1 states that a subsidy constitutes a “financial contribution by a government or any public body within the territory of a Member [government].”<sup>68</sup> This definition precludes a distinction between outlawed subsidies, such as subsidies for exporters, and permitted subsidies, such as those that bolster domestic industries without “adversely affect[ing] other [WTO] members.”<sup>69</sup> This explanation is the only one given in the SCM Agreement regarding the term “public body.”<sup>70</sup> In subsequent disputes, the DSB and AB would resort to extrapolation of the terms “government” and “state” in the International Law Commission Article on State Responsibility in order to form a nascent definition of “public body.”<sup>71</sup> The USDOC, as it argued in subsequent trade remedies cases involving Chinese subsidies, supports defining a “public body” as an “entity controlled by a government via majority state ownership,” without any requirement that the entity perform governmental functions or hold and wield “governmental authority.”<sup>72</sup> Contrastingly, as replicated in its argument in a trade remedies case

involving China, Brazil asserts that, by definition, a “public body” must have the ability to perform “typical governmental functions and [exercise] the authority inherent to such functions.”<sup>73</sup> This 2014 case, entitled *United States – Countervailing Duty Measures on Certain Products from China*, as well as an earlier AD/CVD cases involving concerns over the definition of “public body,” will be discussed in Sections V and VI in greater detail.

#### SECTION IV: CASS AND JACKSON

One of the first prominent international trade scholars to discuss China’s effect on the WTO was John Jackson in 2001. Jackson postulated about China’s future effect on the organization in the March before Chinese accession. In his article, Jackson wrote:

“There is the accession process itself. What has China’s accession process perhaps already done to the WTO? ...There is the question of...the dispute settlement system and its impact on the China/WTO relationship and vice versa...[there] is the question of China and its diplomacy in the WTO; that is, China as a leader of diplomacy with the accompanying coalition, attitudes towards decision-making, allocation of decision-making as a matter of allocating power between the international and national levels, and the question of sovereignty. Finally...the institutional problems for the WTO...there are...150 or 200 items on various lists of suggested reforms to the WTO dispute settlement system...the broad question is: what is going to be China’s role in these various reforms?”<sup>74</sup>

Also in 2001, Deborah Cass hypothesized that in certain situations, Chinese participation would further the constitutionalization of international trade law.<sup>75</sup> By “constitutionalization,” Cass means the organization of international trade law into one coherent and legitimate framework of WTO-based law.<sup>76</sup> This requires that WTO law to be considered not only the preeminent law of trade, but also a coherent and cumulative system of law. Two vectors upon which to assess the relationship between political-economic diversity in the WTO and the constitutionalization of trade law are 1) the extent to which NME participation has affected the use of legal precedent and jurisprudential cross-reference in dispute settlement and 2) the extent to



which one can develop comprehensive answers to new problems in trade disputes within the WTO legal context.

The hypotheses of Cass and Jackson served as the framework through which this thesis conceptualized the potential “changes” to the WTO of Chinese participation. These postulations help pinpoint the important (and perhaps most malleable) WTO institutions and the intellectual and pragmatic shortcomings of international economic law (its potentially in-coherent, non-constitutional nature, lack of *de jure stare decisis*, etc.). Most importantly, though, Cass and Jackson’s work provided clues about where to look for China/NME-induced changes to the multilateral trading system. Cass and Jackson precipitate their arguments on the assumption that Chinese participation would certainly change and indeed has changed the institutions and functions of the WTO to a significant extent. This thesis examines how the WTO was changed by Chinese participation, but also considers that certain WTO institutions and norms remain just as effective as they were pre-2001, or perhaps have even been strengthened. Though the author of this thesis hesitates to make holistic statements about the effect of China and other NMEs on the WTO, her research shows that, in many institutional and cultural arenas, the WTO stands unwaveringly operative and legitimate in the midst of this political-economic diversity. The WTO’s legal ambiguity and lack of effectiveness mentioned in Keohane’s 2002 analysis may exist, but even after this potential and slight degradation, Keohane remains correct that the WTO is a nonpareil international institution respected by its members.

## SECTION V: LITERATURE REVIEW

Little scholarship exists on the effect of NME participation in the WTO. However, some scholars have explored China’s influence, and a few scholars analyze the influence of one

notable WTO case involving Viet Nam and the United States. Bown and McCullough consider two aspects of WTO law affected by Chinese accession, examine the effect of Chinese accession on countries' use of WTO forums, and discuss the perceived international legitimacy of the WTO itself after Chinese inclusion. They note that use of the "China Safeguard" translates into a "strain on the reciprocity-based trading system" and the MFN law in the WTO.<sup>77</sup> The authors define "reciprocity" as emphasized in the GATT/WTO as the norm that when "major players in the system" negotiate, they maintain a "balance of concessions" in terms of trade liberalization and market access.<sup>78</sup> Zhuang explains that countries only have to claim that the goods in question are causing a domestic "market disruption," but not a full injury or even potential injury when instituting the Safeguard.<sup>79</sup> Wu also emphasizes this low standard of "market disruption" that countries must meet.<sup>80</sup> This ambiguity and thus *carte blanche* could give complaining countries even more disproportionate power and further undermine reciprocity in the WTO.

Bown and McCullough's case documentation suggests that as Chinese presence in the WTO increased, the U.S. relied on domestic trade courts as much or more than the WTO dispute settlement mechanism (DSM) to deal with Chinese trade issues outside the subject matter of WTO law.<sup>81</sup> This suggests that political-economic diversification sent a signal to the U.S. that WTO dispute settlement would be more difficult. Perhaps, China's accession signaled a deterioration of WTO functionality and institutional benefit to the Western developed countries, who fashioned the underlying GATT according to their own interests. On the other hand, in detailing China's extensive use of the DSM and eagerness to sit on cases as a third party, Zhuang shows that China respects and trusts the WTO system despite the politically disadvantageous provisions in its accession protocol.<sup>82</sup> However, this increased reliance on the WTO can also be viewed as a symptom of the NME classification retained by China.<sup>83</sup> Urdinez and Masiero

conduct a quantitative study of Chinese WTO cases and determine that, since 2001, countries that have already awarded China “market economy status” (MES) have “initiate[d] fewer antidumping investigations than countries still treating China as an NME.”<sup>84</sup> However, Urdinez and Masiero’s work also shows that some countries, such as Brazil and Argentina, granted MES to China de jure but still use dumping margin calculation methods and other tools that treat China as an NME.<sup>85</sup> Puccio goes as far as to say that Brazil only announced China’s MES and never took any steps to enforce the status at all.<sup>86</sup>

Ji examines the specific techniques used to calculate dumping margins on products from non-market economies.<sup>87</sup> He defines the “analog method” and explains that the two biggest WTO economies — the United States and the EU — use different methods of choosing analog countries and are not required to share their processes with the targeted NME.<sup>88</sup> Ji notes that the EU does not clearly define “NME” and he questions the legality of the European methods.<sup>89</sup> Ji explains that EU NME “criteria” fail to constitute a comprehensive definition because they specify what the economy in a country must *not* be to qualify, rather than what it must be.<sup>90</sup>

Ji argues that these discrepancies increase “the possibility of affirmative findings in an anti-dumping case when in fact the price exceeds the cost of production,” giving the complainants disproportionate power over a respondent NME’s fate.<sup>91</sup> He explains that the analog method often compares China to more developed countries and overestimates incidents of dumping as opposed to market-based pricing.<sup>92</sup> A review of scholarship from Puccio (2015), as well as the U.S. Government Accountability Office’s 2006 study of American anti-dumping calculation methodology vis-à-vis China adds to Ji’s argument; these sources contend that “in general, NME methodologies [used] to calculate normal value have proven to lead to higher anti-dumping duties.”<sup>93</sup> Thorstensen et al. analyze the political implications of NME labeling and

dumping margin calculation methods. Like Ji, the authors discuss that while China may generally be an NME, certain individual firms and industries exhibit stronger indications of capitalist operation than China as a whole.<sup>94</sup> Cases against more market-oriented Chinese industries could disproportionately hurt said industries if methods used to calculate dumping margins or subsidy levels consider the Chinese economy as a whole and not the idiosyncrasies of the industry.

Ahn and Lee argue that up until recently, NME classification and methodologies made it possible for market economies to levy CVDs and ADs on NMEs at the same time, even though this can cause a WTO-prohibited “double remedy” to occur.<sup>95</sup> Simply put, a “double remedy” occurs when ADs and CVDs overlap, causing a double-taxation of sorts on the foreign products. Beshkar and Chilton analyze the implications of one specific WTO case between the United States and China in which China challenged a U.S. law “stipulating that the application of CVD law to NMEs starting in 2006 was legal.”<sup>96</sup> Focusing on how this case affected ideas of DSM capacity and procedural norms, the authors contend that it affected 1) norms regarding complainants’ invocation of specific GATT articles breached 2) understanding of the importance and use of legal precedent and 3) philosophical and literal relationships between WTO law and municipal (national) trade laws and policies.<sup>97</sup> Further, the authors complement Ahn and Lee in discussing this case’s implication that the AB could re-legalize simultaneous AD and CVD imposition using NME calculation methods for both.<sup>98</sup>

When surveying the literature on political-economic diversity in the WTO and the DSM, it is worth discussing Vietnamese participation to understand the new legal considerations that come with NME status. Viet Nam’s most notable case in the DSM, brought against the US, first involved a Vietnamese complaint against “zeroing,” or the US practice of changing any negative

dumping margins (or over-pricings) into zeros.<sup>99</sup> Viet Nam complained that the United States' use of zeroing with regard to certain imports of Vietnamese shrimp violated the WTO Anti-Dumping Agreement, and the Panel agreed with Viet Nam.<sup>100</sup> Viet Nam also brought more convoluted complaints that have specific considerations with regards to NME status in later reviews of *US-Shrimp*.<sup>101</sup> The proceedings of *US-Shrimp* administrative reviews, as Broude and Moore note, illuminate some arcane but still pervasive shortcomings of WTO legal texts.<sup>102</sup>

Viet Nam argued that the United States did not sample a sufficient number of shrimp-exporting enterprises to calculate the “all others” dumping margin.<sup>103</sup> The complainant against an especially large foreign industry may calculate an “all others” margin from a sample of enterprises and then impose that rate on the exporters for which individual data is not considered.<sup>104</sup> De jure, “sampling” is the exception to the general rule of using individual data from as many individual exporters as possible.<sup>105</sup> Broude and Moore mention that in *US-Shrimp*, Viet Nam criticized the U.S. for using sampling as frequently as if this was the general rule and collecting broad firm-by-firm data as if this was the anomalistic method.<sup>106</sup> Further, the Vietnamese critique here targeted USDOC practice not only in cases with NMEs, but across the board.<sup>107</sup> This suggests that the US misapplied WTO law for some time — exposing the shortcomings of WTO legal language and the Anti-Dumping Agreement as a DSM sub-institution — and that factoring NMEs into the mix hardly made a difference about this.

The Panel rejected Viet Nam's claim about insufficient sampling in the initial investigation.<sup>108</sup> Broude and Moore rationalize the Panel's decision by noting that as the number of relevant exporters in an investigated market increases, so does the “cost of conducting an investigation.”<sup>109</sup> That said, the Panel's decision suggests the WTO's recognition that providing comprehensive and holistic data from a foreign industry, especially if it is a large industry, is

difficult regardless of the political economies of parties to a dispute. Various interviewed experts contended that evidentiary standards in the DSM remain intact despite NME participation, implying that evidentiary standards were high quality both before and after NME accessions. Broude and Moore insinuate that since problems with sampling exist regardless, evidentiary collection processes and thus standards were lacking even before the NMEs joined.

Viet Nam also complained (and the Panel ultimately supported this claim) that the United States levied unfairly high dumping duties on state-controlled exporters.<sup>110</sup> In fact, the US chose not to impose the “all others” rate on state-owned shrimp enterprises but instead imposed a rate over five times as high.<sup>111</sup> Even in AD cases involving non-market economies, the “all others” rate should apply to all exporters in an industry. Despite the intuitive presumption that underpricing would be more pronounced among firms owned or mostly controlled by government planners, WTO jurisprudence suggests that complainants against NMEs should still impose the general “all others” rate on state-owned enterprises as well.<sup>112</sup>

Wu contemplates the effect of China’s participation on the norms of dispute settlement, the perceived legitimacy of WTO law, and members’ ability to adhere to WTO rulings. The author considers that holding China to impossible standards of marketization, whether in negotiations or as a prerequisite for certain legal treatment in dispute settlement, delegitimizes said standards and thus the broader WTO advocacy of marketization and trade liberalization.<sup>113</sup> Additionally, the complex and unique requirements placed on China for accession contain a significant amount of legal and economic ambiguity that caused a proliferation of convoluted disputes brought against China.<sup>114</sup> Wu argues that the DSM’s traditional methods of legal interpretation are insufficient to handle cases involving China.<sup>115</sup> Last, Wu suggests that China’s asymmetric concessions (and their uses in dispute settlement) subvert the idea of “non-

discrimination” in the WTO such that these concessions signal the need for a revamped and particularized definition of “non-discrimination.”<sup>116</sup> However, like Zhuang, Wu shows that China is a top performer in the WTO in terms of compliance with DSB/AB decisions and new rules.<sup>117</sup> This implies that any remaining rhetoric targeting China as a tough case or a tricky economic and diplomatic partner in the WTO is not only unfounded, but also perhaps discriminatory and politically motivated. In an article discussing the WTO as the main organ of the “world capitalist economy system” and the experience of Russia in the WTO, Pilipenko (2015) contends that “the WTO is the organization that is not of political but exclusively of economic nature.”<sup>118</sup> Pilipenko’s analysis also insinuates that there is no place for international politics in the WTO, or that issues more political than economic in nature would never arise within the context of this international organization. The results presented later from interviews with experts show that this is not the case at all. International politics undoubtedly matter, and often matter more than pure economic interests, in the WTO and do inform the decisions of WTO members. This plays out in the realms of negotiations, dispute settlement, and even in accession processes themselves. As considered throughout this thesis, NME status is the quintessential subversion of the idea that economic realities always determine outcomes in the WTO.

One interesting phenomenon related to Chinese participation involves the discrepancies between China’s perception of its own behavior in the WTO and the perceptions of China held by other members. In a short article about Chinese effect on WTO institutions, Scott Kennedy (2011) argues: “the gap between China’s own self-image and that of foreign observers, especially in advanced industrialized economies, appears to be growing by the day.”<sup>119</sup> In the beginning, China viewed itself as the reluctant victim of harsh accession conditions; as will be

discussed later, this perspective greatly affected China's strategy in early Doha.<sup>120</sup> The other WTO members that conduct significant trade with China hardly agree; Kennedy notes that many of these countries consider the Chinese Accession Protocol a "sweetheart deal."<sup>121</sup> According to Kennedy, Chinese officials constructed an underdog narrative in which China joined the WTO while "struggling to understand the basic the basic rules and procedures," but now China exhibits sophistication and skill in "the regular committee work, high-level negotiations, and dispute settlement system."<sup>122</sup> But this teleological narrative lacks evidentiary support; the last findings subsection details how China uniquely used the WTO as a domestic political tool. This usage marks perhaps the first time that a country as powerful as China exhibited excitement about what an international organization could do for it rather than what it could do to influence the organization. In short, the humility and cosmopolitan enthusiasm with which China approached its own role in the WTO and international economic community respectively ironically served as the catalysts that caused China to change how the international community understands the WTO.

Zhuang, other scholars, and many experts interviewed for this thesis would attribute much of this developed prowess to China's high rate of third-party participation in the DSM. In fact, China has sat on 129 cases as a third party observer or vocal commentator.<sup>123</sup> Other large members and members with significant trade flows boast similar statistics. The most active third parties, with over 100 cases each, are Japan (159), the European Union (155), the United States (130), China (129), India (116), Canada (110), and South Korea (101).<sup>124</sup> However, all of these members except for China acceded to the WTO and the DSM on January 1, 1995.<sup>125</sup> Below are the average third party cases-per-year figures for the aforementioned members; the figure show



that China raced to experience as much of the DSM as possible and catch up with other large members.

Member	Third Party Observation: Cases Per Year (1 January 1995 to 1 February 2016)
Japan	7.54
European Union	7.35
United States	6.17
China (Participation Begins on 10 November 2001)	<b>9.07</b>
India	5.50
Canada	5.22
South Korea	4.79

As Bown and Crowley assert, “the most radical change introduced by the new China Safeguard is the weakened evidentiary criterion that WTO members must satisfy in order to legally impose a new barrier to Chinese trade.”<sup>126</sup> Less explored is how NME participation has affected the evidentiary standards to which DSM panels hold parties in AD and CVD cases. Quantitative data on the evidentiary standards affected by both the Safeguard and trade remedies calculation for NMEs is difficult to compile due to the confidential nature of many evidentiary submissions to the WTO. This thesis addresses this phenomenon as thoroughly as possible given the constraint of confidentiality and presents all relevant information, as presented to the author in interviews and as found in legal research. One would assume that the proverbial *carte blanche* given to complainants when calculating dumping margins for China or any other NME, as well as the ease with which a country could institute the China Safeguard (for the first twelve years of Chinese involvement) has eroded the standards of evidence in the DSM. Though any answer to this question is largely informed by experiences and opinions of experts, synthesis of discussions with these experts suggest that the record is mixed and highly political.

On the macroeconomic level, authors of the 2007 WTO *World Trade Report* (some of whom were interviewed for this thesis project) pose questions about China’s integration into the

global market economy that consider how WTO accession may be more of a political act than an economic undertaking.<sup>127</sup> Stated in the report is the “idea that signing a trade agreement can be used as a signaling device” and that “WTO membership provided a potent symbol of China’s continuing ‘opening up’ to the rest of the world.”<sup>128</sup> One must wonder then, how much of the boom in trade flows to and from China in the 21<sup>st</sup> century resulted from the domestic macroeconomic and political changes required for WTO membership, or the announcement of membership in an of itself. It may be hard to arrive at a quantifiable, definitive answer to this question of political strategy vs. macroeconomic reality, and the *World Trade Report* concedes that this question is difficult to answer. The Brookings Institution’s Paul Blustein suggests that the political signal of membership did have its own marked effect by writing that “China’s WTO membership made many foreign firms much more comfortable about investing in the country and using it as a prime base for their manufacturing operations.”<sup>129</sup> Interviews with trade lawyers, political economists, and former WTO officials aim to shed additional light on how the international trade community would answer this question based on perceptions of and trends regarding China’s participation and behavior in the WTO.

## SECTION VI: INTERVIEW METHOD AND ANALYTICAL CONSIDERATIONS

The author interviewed 12 international trade experts including lawyers and economic consultants, Secretariat members, and former US government officials. All 12 interviewees participated in “first round” interviews or in direct email correspondence, and 3 participated in further interviews which yielded more in-depth and often less public information. Interviewees and other contacts also engaged in regular correspondence in order to provide further content and

guidance in the interpretation of WTO legal language. All interviewees were asked the same set of questions in the first round. These questions were as follows:

1. Does China instigate more “as such” cases than “as applied” cases, proportionally speaking, than other NMEs or than other developing countries? Do you think this trend relates to either of the aforementioned classifications or another characteristic of China? How has this affected the interpretive strategies, procedures, and legal functions of the DSB and AB?
2. Has NME participation led the AB to adopt a more meta-legal function? In other words, has the AB become more of a rule-maker, more activist, and more concerned with assessing the integrity and legality of WTO laws themselves as opposed to assessing the evidence presented or methods used in the DSB hearing?
3. To what extent did increased trade flows to and from China result from China adhering to the requirements in the Protocol? China has yet to fully complete implementation of these requirements; to what extent was joining the WTO simply a political signal that led to more trade flows, regardless of internal political and economic reforms?
4. Why have China and Viet Nam been rather silent on the impending potential change to NME status? Why are trade associations and industries with a stake in the change in status being silent as well?
5. How has China behaved in the Doha Round? Does it “lead from behind” and let other developing countries lead advocacy for the maintenance of agricultural subsidies?

6. To what extent are the different experiences of China, Viet Nam and Russia reflective of China's unique initiative to be an active third party in dispute settlement? Why have Russia and Viet Nam, and perhaps especially Russia, not taken on similar roles?
7. How has the use of the China Safeguard and a variety of NME methodologies for AD/CVD purposes affected evidentiary standards and the allocation of the burden of proof in dispute settlement?
8. How does China view the DSM, its procedures, and its accepted methods of legal interpretation? Does China act the way it does out of genuine respect or a desire to gain a purely strategic "upper hand" in the multilateral trading system?

The author also conducted original analysis of the following cases in which China acted as complainant:

- a. *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* - DS397
- b. *EC – Anti-Dumping Measures on Certain Footwear (Leather) from China* – DS405
- c. *US- Definitive Anti-Dumping and Countervailing Duties (China)* (DSB and AB) (2008-2011) – DS379
- d. *US- Countervailing Duties on Certain Products from China* – DS437
- e. *United States – Anti Dumping Measures on Shrimp and Diamond Sawblades from China* - DS422
- f. *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings in China* – DS471
- g. *US- Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (in consultations)* - DS368

*h. United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (double remedies case) – DS449

Cases (A), (C), (D), (F), and (H) form a set of cases in which AD duties were imposed by the United States or European Union, and in which certain defendant firms received separate rates, individual treatment rates, or general NME rates. The section on dispute settlement presents the product specifics<sup>4</sup>, margins and methodological considerations of the United States or the European Union in each case. This findings subsection then juxtaposes the levels of marketization of each industry as a whole by synthesizing statistical information about both private firms and state-owned enterprises in each industry. Next, an overall marketization analysis is provided for the relevant industries, as they exist in India, the most commonly chosen analog. Through the presentation of this data, the author opens a discussion of whether the specific Chinese industries targeted in WTO dispute settlement are in fact so significantly less marketized than the “market-based” industries to which they are compared in AD investigations. On the one hand, the targeted industries could be on par with analogous industries in India, suggesting that NME methodologies disproportionately hurt their Chinese targets. On the other hand, these industries could be on par with marketization levels in China as a whole, suggesting that NME methodologies do not have any *unintended* disproportionate victims. If the latter is the case, NME methodologies could still be discriminatory towards Chinese industry but without holding back industries that already perform according to WTO-championed, market-based principles.

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<sup>4</sup> As explained in the dispute settlement findings, these products all fall within the aquaculture products and manufacturing sectors. Margins are considered against the backdrop of industry marketization rates and the marketization of relative industries in India. This offers insight into whether or not NME methodologies for these specific products in WTO cases hurts certain Chinese industries more than is technically and economically legitimate.

To tie case interpretation back to Cass' predictions, this thesis examines elements of precedent, cross-connectivity and consistency present in these cases, and how these elements interacted with the cases' focus on NME and public body definitions. Further, interviews illuminated the idea that legal language and methods of jurisprudential interpretation in the WTO are highly Western-biased and without regard for "quasi-Confucian" or other Eastern legal methods.<sup>130</sup> This is kept in mind while conducting legal analysis. AB and DSB Panelists, as well as private lawyers with experience litigating before WTO Panels were asked more targeted and detailed questions about this Western bias. The implications of this are elaborated upon in the concluding pages.

The author of this thesis recognizes the problematic lack of verifiability with regard to certain new information presented in this paper. Much of the presented findings originate from interviews with trade consultants and litigators that wished to remain anonymous. Some interviewees requested to remain off the record. Their testimonies are omitted from this thesis and simply served to inform the author's original research. Finally, large amounts of the findings about Chinese negotiating techniques, Chinese impact on DSM legal procedures and interpretive methods, and Chinese regard for the WTO itself are based analysis and synthesis of testimony from people involved in trade negotiations and dispute settlement with China. Much of this information cannot be quantified or systematized simply because empirical data on these phenomena does not exist.

## SECTION VII: FINDINGS

The content of the conducted interviews is organized and presented in accordance with the sub-institutions of the World Trade Organization itself. This section discusses China/NME influence on the Doha Round (the most recent diplomatic WTO sub-institution), the dispute

settlement mechanism (DSM), and lastly the other mechanisms of the WTO. In all sections, the author will discuss information particular to China's influence as an NME, China's influence as a developing country, and China's influence as its own unique country, both politically and economically, regardless of these classifications. However, with regard to information presented about China's influence as an NME, the author will also discuss findings with regard to NME status more generally and will include comparative analysis of China's experience to that of the other NMEs, namely Russia and Viet Nam. The findings regarding China in WTO Rounds and committees mention the other BRICS countries (Brazil, Russia, India, and South Africa), but not as comparative examples to China. Rather, as will be shown, the BRICS are included to support the information presented about China's experience in and influence on the Doha Round and WTO committees.

#### CHINA IN THE DOHA ROUND

The Uruguay Round of multilateral trade negotiations concluded with the establishment of the WTO and espousal of the GATT (the basis for previous trade rounds) as the new "umbrella treaty for trade in goods."<sup>131</sup> Uruguay Round negotiators also completed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>132</sup> However, developing countries that participated in the Uruguay Round or joined later argued that the intellectual property protections granted by TRIPS would suffocate research and development efforts, and thus innovation-based economic growth, in developing countries.<sup>133</sup> Interestingly, the criticism (from both developing countries and the international community in general) that negotiated patent protections will hurt their R&D and raise prices of vital medicines for people in poorer countries currently underpins opposition to the Trans-Pacific Partnership, and seems to be a general sticking point for opponents of free trade agreements.<sup>134</sup> Building off of these

grievances, in the same month of China's accession, WTO members initiated the Doha Round of negotiations, which would focus on developing countries' concerns such as trade in services, implementation of TRIPS, and agricultural subsidies.<sup>135</sup>

Scholars and international trade law practitioners generally agree that at this point, the Doha Round has stagnated and will probably be officially terminated in the near future. On one hand, the proliferation of bilateral and regional free trade agreements (FTAs), such as the recent US FTA with Korea, the Trans-Pacific Partnership, or the TPP's EU-US analog (the Transatlantic Trade and Investment Partnership) has diverted international trade policymakers' attention away from the WTO's negotiations channels.<sup>136</sup> On the other hand, the Doha Round arguably *de facto* failed on its own terms, due to stalemate and contention between multiple negotiators. As far as China's influence on the Round, a synthesis of scholarship and original interviews suggests that, China can be blamed, in part, for the stagnation of the Round. American scholars and trade lawyers generally attribute the plurality of the blame for Doha failure, so to speak, on China for its *own behaviors*. While China's behind-the-scenes and politically motivated actions did contribute to this stagnation, this thesis reframes that analysis, arguing that China's simple, even if passive, existence within the Round, would have contributed on its own to stagnation. That said, China cannot be blamed for its "simple existence" in the Round. This thesis argues that the WTO's decision to grant Chinese membership in concurrence with Round establishment, as well as the WTO's decision to frame the Round as development-focused (due to the recent inclusion of China within the system) led to stagnation.

The Doha Round has been a platform for the emergence and solidification of a developing country contingent in the WTO.<sup>137</sup> As the story of Chinese participation in and influence on the Doha Round will show, in the Round, diplomatic alliances between developing



countries outweigh economically divergent interests that these developing countries bring to the negotiating table.<sup>138</sup> This again refutes Pilipenko's arguments that the WTO does not house institutions in which international political interplay determines outcomes more than economic interests do. Before going forward with this discussion, it is important to note that policy outcomes in WTO-level negotiations are surely influenced by the domestic political considerations of the negotiating countries, which are sometimes distinct from said countries' domestic economic concerns. For example, Chinese scholars argue that the Chinese set of positions in the Doha Round emphasized the elimination or mitigation of tariffs on agricultural products "not because agricultural trade is crucial to the economy but because of the importance of the political stability of the farming population to Chinese society."<sup>139</sup> Still, supporting the agricultural sector certainly does not hurt the Chinese economy or run counter to domestic Chinese economic interests. This thesis attempts to broaden the understanding of "politicking in the WTO" by arguing that international political dynamics often overwhelm international economic relationships, and that the two are not always parallel. Further, one vignette of China's notable behavior in Doha Round negotiations provides an example of this phenomenon. In this case, a desire to establish international symbolic affiliation with other large developing countries such as India trumped China's specific domestic economic and domestic political considerations.

In accepting massive domestic reforms and urging its population to learn as much about the WTO system as possible, China seemed, in the U.S. perspective at least, enthusiastic to contribute to Doha from the get-go.<sup>140</sup> But scholars and international trade policy practitioners now consider that in the first years of the Doha Round, China remained even more passive and unengaged in negotiations than it has been in the later years of the Round.<sup>141</sup> Two factors, one involving the then-recently completed Chinese accession process and one involving the subjects

of negotiation in early Doha, contributed to this potential passivity. First, Chinese officials still felt the weight of the massive internal reforms and concessions (such as the China Safeguard and NME status) made by exchange for membership in the WTO.<sup>142</sup> Though scholars have devoted entire books to describing the concessions and reforms made by China in exchange for membership, it will suffice here to mention that those concessions are similar, either in economic effect or statutory and conceptual substance, to proposals presented in the early Doha negotiations.

When a WTO member “binds” a tariff, they register the maximum tariff (the bound rate) with the WTO Secretariat.<sup>143</sup> At this point, tariffs on this particular good may not exceed the bound rate in the relevant member country or customs union.<sup>144</sup> However, WTO members often impose tariffs at rates considerably lower than the maximum potential rates registered in Geneva.<sup>145</sup> The international trade policy community calls the difference between these “applied rates” and the bound rates “water.”<sup>146</sup> It is in the interest of trading partners of China, for example, that China decreased its “water” levels because less potential movement in tariffs would provide exporters to China “greater policy security that import barriers will not easily be raised” and thus greater certainty in calculated trade-related economic projections.<sup>147</sup> One interviewee explained that developed countries pushed the reduction of water in BRICS countries as a major intention of Doha negotiations. His estimates provided in interview responses place pre-Doha water levels for the BRICS’ tariffs in general at 8-25%.<sup>148</sup> Further, he mentioned that the Doha water initiatives aimed to reduce these water levels to between 5-8%. If this interviewee’s generalizations are correct, and this thesis assumes that they are, the water levels for BRICS agricultural products leading into Doha were particularly massive. Calculations from Hufbauer, Schott and Wong (2010) suggest that Brazil and India maintained respective

water levels of 36.5% and a staggering 168.8% before any progress on water was made via Doha.<sup>149</sup> China however, was required to reduce its water levels as part of the accession process. If we extrapolate upon the method offered by Zeng and Liang (2013) we find that in the accession process, China reduced its “bound rates on industrial products” to 9.2% and eliminated all water.<sup>150</sup> This provided existent WTO members at the time of accession talks with greater confidence, even if only de jure, regarding the inability of China to wage effective safeguards on industrial imports from developed countries. Assessing this orthodox requirement of no water feeds into a normative analysis of the disproportionate harshness of the Chinese accession process, and helps to unpack whether hyper-strict conditions for Chinese membership had any effect on the diplomatic culture of the WTO and perceived appropriate uses of WTO-related and –based negotiations. The interviewees asked about historical tariff concessions could not say with certainty that any pre-2001 acceding countries made as drastic a concession as China’s “no water” requirements.<sup>151</sup> That said, the main Doha Round expert implied in correspondence with the author that certain Russian concessions made in the accession process might be, by some interpretations, near those made by China.<sup>152</sup>

Hufbauer et al. pinpoint the overall Chinese water level for agricultural products pre-Doha but post-accession at 6.5%, which in relative terms, was hardly higher than the U.S. and EU levels and fell way below the average water levels for 22 cases calculated by the authors.<sup>153</sup> With regard to imports coming from other countries within the Doha coalition of developing nations, China maintained agricultural tariff water levels of just 3.4%, whereas India and Brazil had water levels of 130.7% and 42.8% respectively. In terms of agricultural tariffs *and* tariffs on imported products from other WTO members in more generally, China felt as though it had

already acquiesced to enough water reduction demands and was thus entitled to sit quietly in the early Doha negotiations.<sup>154</sup>

To what extent can the normative claim that China conceded enough in the accession process be supported by the historical quantitative data? One could examine pre-accession and post-accession (but pre-Doha involvement) water levels in China to provide a quantitative answer to this question. This information is notoriously difficult to access due to the lack of transparency provided by the Chinese government with regard to economic and technical trade information before the completion of the accession process.<sup>155</sup> This thesis can assess China's claim by considering the extent to which tariff concessions are, both economically and politically speaking, particularly difficult for China to implement. As the interviewed Doha expert argued: "reducing tariffs was one of the easier things for China to do...much easier than eliminating myriad aspects of state intervention in the Chinese economy."<sup>156</sup> In economic terms, this seems obvious. Tariff reduction, *de jure*, requires simple technical changes to tariff schedules and in terms of implementation, requires notifying the WTO (to list new tariffs in the WTO schedule) and ensuring that trading partners are aware of the changes. But privatization of SOEs, universalization of trading licenses, and improvement of government transparency standards require, for example, elaborate plans for corporate organizational change, blueprints for transitions of corporate power, increased efficiency in export licensing and economic data collection central agencies. It seems that the tariff concessions were not arduous enough for China to invoke the argument that it conceded enough, at least from this angle. But as another interviewee argued, China initiated its own accession process despite the anxieties of the WTO membership, and it did so with enthusiasm and commitment to entering the system successfully.<sup>157</sup> This dynamic granted existing membership the lion's share of political capital in

the accession process, meaning that China lacked the negotiating power to whittle down the WTO-proposed concessions.<sup>158</sup> From this view, China did acquiesce to significant demands pre-Doha, as it squeezed relatively little compromise from the existing membership.

The second reason, according to Paul Blustein of the Brookings Institution, for a lack of Chinese presence in early Doha was that China did not have “major interests at stake in the disputes that plagued the Round in its first few years.”<sup>159</sup> Blustein explains that the initial contentious conversations involved the extension of WTO jurisdiction to issues of “corporate investment...government procurement, and US cotton subsidies.”<sup>160</sup> China refrained from assuming a leadership role on any topic.<sup>161</sup> Instead, “other developing countries” championed the push for government procurement and corporate investment rules, and sub-Saharan African countries were the most vocal on issues of US cotton subsidization.<sup>162</sup> In fact, the West African drafters of the Second Initiative in Favour of Cotton (submitted right before the 2003 Cancun Ministerial) criticized China as a cotton subsidizer whose actions were equivalent in scope and deleterious effect to those of the U.S. and E.U.<sup>163</sup> Issues of investment and procurement fell within the context of the “Singapore Issues,” or a package of issues that were proposed by the European Union and other developed nations to be included on the Doha agenda; one major consideration within the Singapore Issue context was whether or not the WTO should or could have the authority to write the rules of these domains.<sup>164</sup> China exhibited flexibility with regard to this legal consideration.<sup>165</sup> Aside from occasionally throwing its weight around with developing countries behind the scenes, China did not attempt to vocalize any new, oppositional, or particularly loud opinions about the legal scope and purposes of the WTO system.

One instance of Chinese participation in the Doha Round that Blustein examines occurred during a July 2008 Ministerial Meeting in Geneva. Many Western academics argue that this

moment marks China's increased participation, relevance, and oppositional behavior in the Round. Chinese and other East Asian scholars obviously push back against the ideas that this moment ruined progress in negotiations or that it signifies a change in Chinese interests and strategic reasoning. In his interview sessions, the international trade litigator with perhaps the most thorough knowledge of Doha Round history of any American lawyer interviewed, mentioned this 2008 meeting as a critical moment in China's Doha presence. First, the WTO Director General at the time, Pascal Lamy, invited China to participate in an elite subgroup of negotiations (called the G7) with six other powerful and large economies, including India and the United States.<sup>166</sup> At this Ministerial, India advocated to maintain subsidization of rural farmers and intended to resist intra-meeting initiatives for tariff reductions in order to protect its own unique domestic interests.<sup>167</sup> Further, India sought to establish the guidelines for a safeguard mechanism against increased agricultural products from developing countries, and specifically wished to write the rules counter to the proposals of the other chief safeguard negotiator, the United States.<sup>168</sup> India demanded Chinese support regarding subsidy maintenance and, given China's status as a developing country, perhaps expected its support on the safeguard mechanism.<sup>169</sup> In the initial negotiation interactions after this moment, Chinese behavior suggested to the rest of the G7 that it would remain uninvolved in these negotiations.<sup>170</sup> However, in a dramatic turn of events in late July, China decided to provide support for the Indian agricultural proposals and to vocally oppose U.S. positions and behaviors, which stunned U.S. trade policy practitioners.<sup>171</sup>

To be sure, in 2008, agriculture accounted for 10.3% of Chinese GDP compared to 17.8% of Indian GDP.<sup>172</sup> Further, China was already undergoing a decrease in GDP share of agricultural production, whereas India maintains a steady, comparable level of agricultural sectoral share

today.<sup>173</sup> China's interests in maintaining agricultural subsidization and mitigating the potential damage caused by developed countries' safeguards on agricultural imports aligned with those of India. That said, in terms of pure economic policy, China's stake in the matter was less significant.<sup>174</sup> As a result, China was initially content to play the middleman between the U.S. and India on these issues, calling for import-increase rates at which safeguards could be employed that sat squarely between the U.S. proposed 40% rate and India's proposed 15% rate.<sup>175</sup> Also, as considered above, the Chinese "post-accession" complex regarding concessions already made led China to argue that it deserved the role of middleman and was not obligated, politically, to pick a side. China's change of heart came from India's last minute, non-public push for the establishment of a developing country political coalition, not from a change in China's economic situation or China's understanding of its domestic political-economic stakes in the matter. Since no notable progress on agricultural subsidies or other major development initiatives has been made since, it is fair to say that this coalition building worked, and it solidified a developed/developing dyad within the WTO.<sup>176</sup> However, the schism here involves more than just the trade and macroeconomic interests of the membership; it is also a schism over what the purpose of the WTO itself *should* be. On one side are the traditionalists from developed countries, arguing that the WTO's main functions should still be tariff reduction and trade liberalization, as they were before the Uruguay Round.<sup>177</sup> On the other, the BRICS reformers who believe that poverty reduction should be the *main* focus of the WTO, perhaps despite the fact that another Bretton Woods institution, the World Bank, is already charged with this responsibility.<sup>178</sup> As is discussed in the section on currency manipulation, perhaps China's participation in the WTO has illuminated the ineffectiveness of the other Bretton Woods

institutions and thus instigated arguments that the WTO should assume the IMF's and World Bank's goals as its own.

The 2008 episode stands as compelling evidence towards the argument that the Doha Round may not have stagnated if it were not for the behind-the-scenes proactive behaviors of China. That said, as Cho (2010) argues, “developed countries appear to be increasingly oblivious to the original reasons for Doha’s creation: to foster a development round launched in response to...the UN Millennium Development Goals (MDGs).”<sup>179</sup> Interview responses from one prominent American international trade lawyer and expert in U.S. trade policy support and expand upon Cho’s argument. This specialist asserted that, despite the original Round name including and emphasizing the word “Development,” the Round was never intended to be about development.<sup>180</sup> In fact, in this lawyer’s opinion, the Round was both illegitimate and a misguided undertaking from the start.<sup>181</sup> She explained that WTO members launched the Doha Round in November of 2001 as an “act of solidarity post 9-11” rather than as a multilateral initiative with pragmatic or defined goals for trade liberalization.<sup>182</sup> Considering Doha’s true political underpinnings, it seems that the WTO granted Chinese accession immediately before Doha in order to frame the Round as a development initiative rather than to be honest about its actual symbolic nature. With this in mind, China could have acted in almost any other way — as a committed contrarian to U.S. proposals, as a U.S. supporter, or even as a developing world leader — and the Round still would have stagnated. This is because China, as a large and developing country, inevitably brings the “developed vs. developing world” showdown with it wherever it goes, and the Round was never, in actuality, prepared to handle the issues that arose as the result of this bipolar relationship.



As a mostly-passive member of the development and agricultural coalition, China's actual actions neither illuminated legal or structural shortcomings in the WTO system, nor did it strengthen the WTO's legal and diplomatic channels. Overall in the Round, China did and still does exhibit passivity or at least quiet strategic behavior.<sup>183</sup> At this point China's ability to maintain a spot as a top Doha negotiator without actually providing substantial support for or contributions to the progress of the Round suggests something new about the institutional prognosis of WTO-level multilateral trade negotiations. China's population, enormous GDP, and internationally consequential volume of trade flows grant it a seat at the table with the major WTO players.<sup>184</sup> That said China has done little to champion proposals integral to the interests of the developing world, despite the vaguely supported counterarguments from Chinese officials.<sup>185</sup> Of course, to suggest that China should be denied a seat at the table with other large countries would be a representational slight to the Chinese state and people. That said, the inevitable impasse that occurs from including a non-proactive member in top negotiations means that WTO negotiation channels will remain subpar, and regional and bilateral trade agreements and negotiations forums will proliferate.

#### CHINA AND WTO DISPUTE SETTLEMENT

Upon acceding to the World Trade Organization, all countries, including China and other non-market economies, accept the Organization's Dispute Settlement Understanding, which was signed alongside the founding treaties in 1994. This text stipulates the procedural and substantive rules governing dispute settlement as well as the appellate process in the WTO. Initial research and consultation with experts suggested that China's greatest effect, and perhaps greatest negative effect, on the WTO as a functional institution would appear within the context of the

dispute settlement mechanism.<sup>186</sup> Of course, comprehensive answers to this question largely rely on information protected within client-representation relationships. This thesis provides all information on this topic collected during the interview process and public data and begins to build an analysis that, in tandem with future information made public, could develop into a compelling diagnosis of the DSM's ability to handle a diverse membership.

As introduced in the literature review, China acquiesced to a unique safeguard mechanism that countries could use against China as an “import-restricting policy instrument.”<sup>187</sup> The terms of China's Accession Protocol also permitted (and still permit, until December 2016 at the earliest) countries to use NME-specific methodologies for calculating dumping margins.<sup>188</sup> To calculate dumping margins for countries without reliable, market-based pricing information, the United States, as the most prolific wielder of such AD cases against China begins by pinpointing an analog market economy from which comparable pricing data can be pulled.<sup>189</sup> The U.S. usually picks India, as it is “at a level of economic development comparable to [China]” is usually also a “significant producer” of the product at question, and “Indian data for valuing factors of production are readily available.”<sup>190</sup> The United States then calculates the normal value of the product through determining input value from factors of production and adding that to shipping, handling, and administrative costs.<sup>191</sup> If the USDOC determines that neither India nor any other potential analog candidate comparably produces the product at question, the DOC is in methodological no-man's land and must improvise in a more makeshift fashion than the aforementioned practices.<sup>192</sup>

The European Union and the United States provide for Individual Treatment (IT), or individual examination of certain exporting companies within non-market economies.<sup>193</sup> In both the E.U. and U.S. practices, only exporters can apply for these special rates.<sup>194</sup> Just as it does for

non-market economy classification, the E.U. uses a positive list of company characteristics that permit an exporter or importer in an NME to receive market treatment, and thus individual (and likely lower) dumping margins.<sup>1955</sup> As China explained in its written submission for an AD dispute with the E.U., if a firm qualifies for individual treatment, their dumping margins are calculated by directly comparing their pricing data with that of a specific, equivalent firm in the analogue country. If a firm fails to meet the market treatment requirements, they receive the general dumping margin calculated from the country wide analogue method.<sup>196</sup>

The United States DOC criteria for a separate rate are divided into de jure requirements and requirements that, in practice, follow as a result of the codified requirements. The de jure requirements specify three aspects of the firm's relationship to the government that emphasize the absence of connection, whereas the in practice requirements focus on the presence of pricing and corporate management factors.<sup>1976</sup> As explained in the case description for one of the

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<sup>5</sup> In the resolution imposing anti-dumping duties on Chinese steel fasteners, the European Union details its five requirements for market economy treatment. In order, the necessary characteristics are: "1. business decisions and costs are made in response to market conditions and without significant State interference; 2. firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes; 3. there are no significant distortions carried over from the former non-market economy system; 4. bankruptcy and property laws guarantee legal certainty and stability; and 5. exchange rate conversions are carried out at market rates" (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:029:0001:0035:EN:PDF>)

<sup>6</sup> From a Sidley Austin International Trade Update: "The de jure factors are: 1. An absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2. Any legislative enactments decentralizing control of companies; and 3. Any other formal measures by the government decentralizing control of companies. The de facto factors are: 1. Whether the export prices are set by, or subject to the approval of, a governmental authority; 2. Whether the respondent has authority to negotiate and sign contracts and other agreements; 3. Whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4. Whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." (<http://www.sidley.com/~media/update-pdfs/2015/05/20150507-international-trade-update.pdf>).

domestic cases revisited in *US-AD/CVD* (2010), the USDOC explains that it “begins with a rebuttable presumption that all companies within [an NME] are subject to government control and, thus, should be assigned a single antidumping duty deposit rate.”<sup>198</sup> As determined in the USDOC original Shrimp and Sawblades case against China (revisited below), a firm qualifies as government controlled if it fulfills as little as one of the structural or financial criteria necessary to receive the country-wide NME rate.<sup>199</sup> This again illuminates the problem with the WTO’s permission of a rigid market economy-NME dyad. In China and Viet Nam, this overgeneralization would lead to the marginalization and discrimination of market-based firms with just one non-market characteristic that could not thoroughly and accurately respond to USDOC investigational questionnaires, which could occur for a variety of reasons. Potential reasons include a firm’s lack of legal resources to adequately complete the questionnaires, communication asymmetries between USDOC and the firms, shorter timeframes imposed on NME-based firms “by which to complete the lengthy application necessary to demonstrate the absence of government control,” or the possibility that the USDOC simply did not know of the particular firm’s existence.<sup>200</sup> For industries on the whole as marketized as those in market economies, the methodologies are both procedurally superfluous and potentially discriminatory.

With regard to the following data, this thesis uses the terms “privatized” and “marketized” both interchangeably and synonymously. The author recognizes a few problems with this conflation but ultimately decided to retain it. There always exists the possibility that certain Chinese SOEs (and international SOEs, for that matter) align their prices with those of private national firms in a given period. In this sense, SOEs can be momentarily “marketized,” as they would behave according to the market forces of supply and demand, but would remain un-privatized.<sup>201</sup> That said, Chinese SOE pricing data does not exist in a comprehensive or reliable

location, as the Chinese government is notoriously opaque with regard to this information. Further, given the sheer number of Chinese SOEs in each industry, this data, if it were available, could take years to compile. Given these setbacks, privatization based on privately produced percentage of total output serves as the best analog method, so to speak, for determining marketization rates.<sup>202</sup>

Scholarship shows that NME status correlates positively with higher-than-average dumping margins calculated by the U.S. Department of Commerce.<sup>203</sup> Specifically, Blonigen (2003) shows that “foreign firms from non-market economies, where the USDOC uses third-country data to estimate normal value leads to dumping margin that is 25.4% larger than average.”<sup>204</sup> Chu and Prusa (2003) interpret Blonigen’s work as a positive determination that “even after controlling for all these unfavorable factors, China is subject to an inexplicably large number of anti-dumping attacks.”<sup>205</sup> If AD cases (initiated with anomalous frequency and consistent use of NME methodologies) against China that make it to the WTO and target industries that have marketized more than the Chinese economy on the whole, then the WTO DSM and NME rules contribute to a dynamic in which Chinese industries are asymmetrically and unfairly attacked in the AD arena. The margins are not only higher than they should be in cases of state ownership, but also higher than they should be for the firms that are truly marketized but fall between the cracks.

Review of AD cases involving China shows that the targeted Chinese industries are those of coated free sheet paper, iron and steel products, pneumatic tires, footwear, shrimp, and diamond sawblades. To be sure, the individual cases focused on these products also bring to light other idiosyncratic issues of NME participation. These include considerations such as simultaneous imposition of AD duties and CVDs, the definition of “public body” for the

purposes of an NME, and the practice of zeroing, both in general and with regarding to state-owned enterprises.<sup>206</sup> There is also a recent case in which China complained about NME AD methodologies directly.

The following table provides the dumping margins and methodological specifics used by the United States and the European Union in the aforementioned AD cases involving China. CVD calculations in the cases (or cases involving only CVDs) are omitted. Next shown are the marketization rates for targeted industries. Shrimp is omitted for reasons explained below.<sup>7</sup>

AD WTO CASES: CHINA AS COMPLAINANT

Case	Dumping Margins Imposed Before WTO Case	Methodological Information for Dumping Duty Calculation and Imposition
<i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (2009)</i>	<ul style="list-style-type: none"> <li>Individual Treatment Average Margin: 56.73%<sup>207</sup></li> <li>General NME Margin: 115.4%<sup>208</sup></li> </ul>	<ul style="list-style-type: none"> <li>Use of India as an analog<sup>209</sup></li> <li>Only 10 Chinese exporting companies willingly provided credible pricing information to the EC, and 9 of these 10 fit the IT qualifications and were chosen to support the individual treatment calculation.<sup>210</sup></li> </ul>

<sup>7</sup> Chinese aquaculture and fishing firms often catch and sell both fish and prawns (including but not limited to shrimp), alongside myriad other aquaculture products. It is possible to conduct a marketization analysis for the whole fishing industry at large and it is possible to find total output values for the total shrimp industry specifically. It is not possible to find the output value of SOE-produced shrimp specifically as the SOEs do not publish the percentage of their total output devoted to prawn production. SOE outputs are divided into fish and aquaculture outputs, whereas POE outputs are divided by species. In other words, the categories for SOE and POE do not match up and therefore marketization analysis using the below method would be meaningless and probably inaccurate. Further, this thesis only considers centrally owned SOEs (in all examined countries and industries), and much of the shrimp production occurs at the provincial and local levels.

<p><i>US- Definitive Anti Dumping and Countervailing Duties on Certain Products from China (2009-2011)</i></p>	<p>(Dumping Only)  <u>Circular Welded Carbon Quality Steel Pipe (CWP):</u></p> <ul style="list-style-type: none"> <li>General NME rate: 85.55%</li> <li>Uniform Separate Rate: 69.2%<sup>211</sup></li> </ul> <p><u>Pneumatic Off-the-Road Tires:</u></p> <ul style="list-style-type: none"> <li>General NME rate: 210.48%</li> <li>Uniform Separate Rate: 5.25%<sup>212</sup></li> </ul> <p><u>Light-Walled Rectangular Pipe and Tube (LWR):</u></p> <ul style="list-style-type: none"> <li>General NME rate: 264.64%</li> <li>Uniform Separate Rate: 249.12%<sup>213</sup></li> </ul> <p><u>Laminated Woven Sacks (LWS):</u></p> <ul style="list-style-type: none"> <li>General NME rate: 91.73%</li> <li>Uniform Separate Rate: 64.26%<sup>214</sup></li> </ul>	<ul style="list-style-type: none"> <li>CWP: Use of India as an analog.<sup>215</sup></li> <li>Pneumatic Tires: use of Maersk conglomerate prices and Indian companies for surrogate pricing.<sup>216</sup> Interestingly, these surrogate choices were retained despite the inclusion in this case of dumping complaints against Indian companies.<sup>217</sup></li> <li>LWR: Use of India as analog.<sup>218</sup></li> </ul>
<p><i>United States – Anti Dumping Measures on Shrimp and Diamond Sawblades from China (2011)</i></p>	<p><u>Shrimp:</u></p> <ul style="list-style-type: none"> <li>Individual Respondent Margins (Average): 48.79%<sup>219</sup></li> <li>Uniform Separate Rate Margin: 55.68%<sup>220</sup></li> <li>General NME Margin: 112.81%<sup>221</sup></li> </ul> <p><u>Sawblades:</u></p> <ul style="list-style-type: none"> <li>Individual Respondent Margins (Average): 28.94%<sup>222</sup></li> <li>Uniform Separate Rate Margin: 21.43%<sup>223</sup></li> <li>General NME Margin: 164.09%<sup>224</sup></li> </ul>	<ul style="list-style-type: none"> <li>Shrimp: The USDOC used zeroing to calculate the margins for the “separate rate” firms.<sup>225</sup></li> <li>Sawblades: Use of India as an analog.<sup>226</sup></li> </ul>
<p><i>US- Preliminary Anti-Dumping and Countervailing Duty Determinations on</i></p>	<ul style="list-style-type: none"> <li>Average Separate Rate Margin: 33.83%<sup>227</sup></li> </ul>	<ul style="list-style-type: none"> <li>Use of India as an analog.<sup>229</sup></li> </ul>

<i>Coated Free Sheet Paper from China (2007)</i>	<ul style="list-style-type: none"> <li>General NME Margin: 99.65%<sup>228</sup></li> </ul>	
<i>EC- Anti-Dumping Measures on Certain Footwear From China</i>	<p>China</p> <ul style="list-style-type: none"> <li>Market Economy Treatment Rate: 5%-16%</li> <li>NME Rate Using Indonesia: 19%-22%</li> <li>NME Rate Using Brazil: 35%-38%</li> </ul> <p>Viet Nam</p> <ul style="list-style-type: none"> <li>Market Economy Treatment Rate: none granted</li> <li>NME Rate Using Indonesia: 28.4%</li> <li>NME Rate Using Brazil: 43.8%<sup>230</sup></li> </ul>	<ul style="list-style-type: none"> <li>This case also involved imports from Viet Nam.</li> <li>Use of Brazil as analog due to a sizeable product market in Brazil. The EC notes, though, the faultiness of this analog decision, as Brazil, China, and Viet Nam do not show similar levels of economic development. Given the analog choice problems, margins were also calculated using Indonesia as an analog for a second opinion, so to speak.<sup>231</sup></li> </ul>

MARKETIZATION/PRIVATIZATION IN CHINA: (2011)<sup>2328</sup>:

Industry	Total Output from State-Owned or State-Held Enterprises	Total Output of Privately-Owned Enterprises	Total Output of Industry (SOE + POE)	Marketization/ Privatization Level for Industry
Manufacture of Rubber Products <sup>9</sup>	Number of SOEs: 100 Gross Output Value: 889.96	Number of POEs: 1847 Gross Output Value: 2701.66	Output: 3591.62	75.22% of output
Manufacture of Metal Products <sup>10</sup>	Number of SOEs: 381 Gross Output Value: 1346.28	Number of POEs: 9982 Gross Output Value: 11590.82	Output: 12937.10	89.59% of output
Smelting and	Number of SOEs: 312	Number of POEs: 4246	Output:	41.05% of output

<sup>8</sup> Statistics come from the China Statistical Yearbook of 2012. Output percentages for aquaculture come from a publication cited in note 12. All data comes from the year 2011 as by that time all cases considered in the above AD margin chart had been initiated by then. Gross Output Value is measured in 100 million Yuan.

<sup>9</sup> The author assumes that pneumatic tires fall within the rubber and plastics manufacturing category.

<sup>10</sup> The author assumes that diamond sawblades and LWR fall within the metal products category.



Pressing of Ferrous Metals <sup>11</sup>	Gross Output Value: 23652.24	Gross Output Value: 16469.26	40121.50	
Paper and Paper Products	Number of SOEs: 127 Gross Output Value: 838.64	Number of POEs: 4182 Gross Output Value: 4604.78	Output: 5443.42	84.59% of output
Manufacture of Textile (non-wearable and non-carpet) <sup>12</sup>	Number of SOEs: 275 Gross Output Value: 769.96	Number of POEs: 14883 Gross Output Value: 16464.33	Output: 17234.29	95.53% of output
Manufacture of Textile Wearing Apparel, Footwear and Caps	Number of SOEs: 124 Gross Output Value: 183.59	Number of POEs: 6060 Gross Output Value: 6039.93	Output: 6223.52	97.05% of output

Before presenting the Indian data, it should be noted that only 225 centrally owned SOEs were operating in India by the end of 2011.<sup>233</sup> Due to this fact, statistics regarding the number of SOEs per industry are omitted, and only output value statistics (revenue) are shown. The list of CPSEs is taken from the Indian Department of Commerce website.<sup>234</sup>

#### MARKETIZATION/PRIVATIZATION IN INDIA (2011)<sup>13</sup>

Industry	Total Output from State-Owned or State-Held Enterprises	Total Output of Industry (SOE + POE)	Marketization/Privatization Level for Industry
Manufacture and Reparation of Rubber Tires and Tubes <sup>14</sup>	Gross Output Value: 27.04 (one firm, Tyre	Output: 48,205	99.94% of output

<sup>11</sup> The author assumes that all iron and steel products discussed in this thesis fall within this category.

<sup>12</sup> The author assumes that Laminated Woven Sacks fall within this category of textile production.

<sup>13</sup> Data comes from 2011 or the closest available year (marked when applicable). However, it is assumed that while new private firms may have been established in India between 2011 and 2016, the number of SOEs remained relatively static, as India is not undergoing marketization process like China. SOE data are collected from various sources, as cited in the notes, and total industry output values collected from the India Statistical Yearbook, 2015. Output Values are in 10 million Rupees.

	Corporation of India Ltd.) <sup>235</sup>		
Manufacture of Cutlery, Tools, and General Hardware <sup>15</sup>	N/A	Output: 11,327	Virtual full marketization
Manufacture of Iron and Steel <sup>16</sup>	Gross Output Value: 58,136 Three Firms: <ul style="list-style-type: none"> <li>Mishra Dhatu Nigam (518.5442)<sup>236</sup></li> <li>Steel Authority of India (42,718.71)<sup>237</sup></li> <li>Rashtriya Ispat Nigam Ltd 14,899<sup>238</sup></li> </ul>	Output: 607,846	90.44% of output
Paper and Paper Products	Gross Output Value: 7,002.8 <sup>239</sup> (one firm, Hindustan Paper)	Output: 67,589	89.64% of output
Manufacture of Textile (non-wearable and non-carpet) <sup>17</sup>	Gross Output Value: 448.26 (National Textile Corporation) <sup>240</sup>	Output: 302,500	99.83% of output

#### MARKETIZATION/PRIVATIZATION IN BRAZIL AND INDONESIA (2011)<sup>18</sup>

<sup>14</sup> Used as a sub-industry of the rubber industry to provide a more accurate categorization for pneumatic tires.

<sup>15</sup> More specific Indian industry used as a benchmark for the diamond sawblade industry.

<sup>16</sup> Closest analog industry category to Chinese “Smelting and Pressing of Ferrous Metals.” LWR included, conceptually speaking, for Indian data in this category.

<sup>17</sup> State-owned textile production in India originates with the National Textile Corporation (NTC). The NTC was lossmaking and considered a sick SOE until late 2014. The output value provided represents sales of yarn and cloth products in 2011-2012. This company makes almost entirely non-apparel textiles (Personal correspondence, Prof. Devesh Kapur, Director, Center for Advanced Study of India University of Pennsylvania, March 23, 2016).

<sup>18</sup> Indonesian output value in billion U.S. dollars and Brazilian output in 1000 Brazilian Reals.

Manufacture of Footwear and Apparel in Brazil <sup>241</sup>	N/A	N/A	Output: 7,356,925	Virtual full marketization <sup>19</sup>
Manufacture of Footwear in Indonesia <sup>242</sup>	N/A	N/A	Output: 50,096	Virtual full marketization

The author considered certain Indian industries to be operating at virtual full marketization levels if, after scrutiny of India's 225 active central SOEs, it was not apparent that any SOE produced the product in question. Though the industries may include provincial SOEs, this thesis does not consider those and instead conceptualizes provincialization as akin to decentralization and thus as evidence of a trend towards privatization and marketization. To be sure, Indian SOEs are notoriously conglomeratic, and the production of obscure products, such as certain laminated woven sacks, could be buried within their production data. The author recognizes this fact, but after surveying a variety of publications detailing the activities of certain candidate Indian SOEs, arrived at the conclusions that a) either the production of these obscure goods was not present or b) it was inconsequential with regard to the SOE's output and the relevant industry share as a whole. Last, to analyze this data, this thesis defines a "marketized and privatized" industry as one operating at an 89% marketization level or above. The author chose this level, as it is the marketization level to the closest integer, rounded-down, for the least marketized Indian industry in the data, and India is considered a full market economy.

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<sup>19</sup> Despite the fact that the Brazilian government does not operate recognizable or substantial (if any) footwear production enterprises, in terms of government procurement, the Brazilian government does, arguably, provide disproportionate preference to its footwear and apparel companies vis-à-vis foreign providers. For more information see: Bureau of Economic and Business Affairs, "2015 Investment Climate Statement – Brazil," (Washington, DC: United States Department of State, 2015), <http://www.state.gov/e/eb/rls/othr/ics/2015/241494.htm>.

Based on the above data, the Chinese textile and metal products industries constitute privatized and marketized industries. Though it fails to meet the benchmark established in this thesis, the Chinese paper products industry also comes close to qualifying as a marketized industry. According to this data, the greatest possibility for NME status-based discrimination, rooted in the technical, legal, and administrative reasons listed above, has existed within these industries. The Chinese rubber firms unable to prove autonomy seem to deserve the NME rate. That said, the analog Indian industry used includes the reparation of tires; the categories are not entirely equivalent, and it may be that Chinese reparation services are housed in separate and possibly, on average, more privatized firms than tire manufacturing.

The data above supports the comments from various interviewees that steel industries stand to lose the most from a change in the status for the Chinese economy.<sup>243</sup> The privatization discrepancy in steel between China, India, and other WTO members is vast; thus the steel industry's push to maintain NME status despite China's general marketization makes sense. However, the above data suggests that the push to conserve NME status is an anchor, dug into the groundwork of steel interests, dragging the other Chinese industries underwater. That NME status seems to align most effectively and ethically with steel suggests that for other Chinese industries and perhaps many individual firms, NME status is nothing but a political roadblock keeping them from recognizing the full benefit of an earned WTO membership.

### EVIDENTIARY STANDARDS

Interviewees tended to provide "yes-or-no" answers, often with explanation added later in the interview, to the questions involving the degradation of evidentiary standards. To clarify, this question goes beyond asking whether or not NME methodologies as a whole system ignore the

increasing marketization of targeted Chinese industries. Instead, it asks whether or not invoking NME methodology sends a signal to a WTO Panel that the Panel need not require as much economic evidence, analog or not, to assess a case. Of the 12 interviewees, three answered “no” to question 7, three answered yes or yes to some extent, two provided unique, potentially neutral answers, and four did not comment or felt as though the question could not be answered. Three of the eight responders offered extended answers, detailed below:

#### “FUNGIBILITY OF NATIONS” (YES)

The interviewee possessing the highest level of familiarity with China’s accession process argued that these “rules apply a fungibility of nations.”<sup>244</sup> Though this subject did not elaborate much, Ji Ma’s work on the analog method both supports and expands this analysis. As Ji Ma notes, “the most often chosen analogue country [in trade remedies cases in general, not just in the DSM] to China by the U.S. is India, while for the E.U. it is [the] USA.”<sup>245</sup> As shown in the *Footwear* case, members sometimes use Indonesia and Brazil as well. It seems that the vague guidelines, as stipulated individually by WTO members and sanctioned by the WTO, allow, in practice, for members to choose analog countries based on one metric such as comparable production of the good in question and/or level of economic development. Perhaps a test using just these two components can at times draw meaningful comparisons between China and India, China and the U.S., China and Brazil, or China and Indonesia. However, the facts-on-the-ground show that the analog method allows for an interchangeability of countries even when the production or development data does not match up as best as it could.

Of Chinese industries that find categorically equivalent analogs in the Indian data, each is substantially larger than its Indian counterpart.<sup>246</sup> While the data above provides rough

estimations for the relative size of Chinese and Indian industries, to accurately compare industry size, one must look at crude production rather than at income. Comparative factors of consumer preference, nuanced quality of goods, or the conglomeratic and multi-product nature of certain companies could make prices, and thus total income/output, a faulty measure of relative industry size. Further, the categories presented in the marketization data may not match up perfectly across countries; for example, the Indian hardware and tools industry is smaller, obviously, than the more general Chinese “metal products” industry. To remain as accurate and politically relevant as possible, one can consider the steel industry a case in point here. The Chinese steel industry was 9.59 times larger than the Indian steel industry in terms of crude production in 2011, and the closest comparable producer to China was Japan.<sup>247</sup> That said the Japanese enjoy an astronomically higher level of macroeconomic wellbeing than the Chinese do. For a factor test as rudimentary as that involved in the analog method, the best analog for the Chinese steel industry exists somewhere between the Indian and Japanese markets and thus, of course, a suitable analog does not actually exist. This specialist’s comment and the simple example of Chinese steel show that the analog method allows WTO members to assess the Chinese economy through rudimentary and inappropriately isolated factors. As a socialist market economy, a developing nation, and a manufacturing hegemon, China is idiosyncratic and un-replicable by the models and methods of AD calculation.

#### AD/CVD IN GENERAL (NO)

One international trade lawyer pushed back against the idea that NME methods in particular caused an erosion of evidentiary standards in the DSM. Instead, he argues that the way in which the WTO Panels assess AD and CVD cases in general bring a degraded sense of

evidence to the multilateral trading system.<sup>248</sup> First, this interviewee distinguished between “as such” claims (challenge of a provision, method, or trade regulation as a whole) and “as applied” cases (challenge of how a provision, method, or regulation was used in a particular moment). He mentioned that, overall, more “as such” claims than “as applied” claims have been made by China in WTO dispute settlement. He argued that “as such” claims impact the DSM structure and functionality more than “as applied” do in that the espousing cases for “as such” claims require less factual evidence to be presented and grant greater room for the dispute parties to offer divergent, multifaceted, and far-reaching interpretations.<sup>249</sup> China’s participation may have degraded the evidentiary standards of the DSM, but this was not due to any unique economic or political characteristic of China itself. Rather, China has often challenged U.S. provisions as whole statutes, thus facilitated the emergence of a dispute settlement system that relies on less evidence more frequently to establish Panel decisions.

#### THE RULES ARE AIRTIGHT (NO)

A few interviewees seemed astonished at the idea that NME methods cause structural problems related to evidence presentation. These subjects added that the DSM system for trade remedies, in general, is as structurally sound as it could be. The interviewees who maintained this position have worked within the WTO system itself as panel members or Secretariat counsel.

Interview subjects remain entirely anonymous, even when assessing the underlying motivations behind a “yes” vs. “no” answer. What can be said, though, is that those with more expertise in the WTO system tended to reject the notion of degraded evidentiary standards, whereas those with more expertise in Chinese trade and legal practices tended to consider it

plausible. All of this considered, the trend remained clear that if standards were degraded, it was less because of particular challenges brought by China and more because of the potential for inconsistencies in interpretation and application of NME rules as written and used by market economies.

Interviewees pinpointed the 2014 CVD case brought by China against the U.S. (case D in the method section) as an instance metonymical of China's participation in the DSM. To reiterate, this case involved deeper interpretation of the term "public body" for the purposes of determining the existence of prohibited subsidization. It was initiated a few years after DS379, which was the first instance of China challenging a U.S. understanding of "public bodies." Evidently, this claim constitutes an "as such" claim rather than an "as applied" claim. In DS379, "the [AB] reversed the Panel's finding that the term 'public body' in...the SCM Agreement means 'any entity controlled by the government.'"<sup>250</sup> Instead, the AB asserted that a public body is, at its "core," that "possesses, exercises or is vested with governmental authority"<sup>251</sup> In the 2014 case, China disagreed with the USDOC's revised criterion that a "public body" be more than 50% government owned.<sup>252</sup> One D.C.-area international trade lawyer recalled the 2014 case and explained that the "conflicting economic systems" of the parties "underlay the different interpretations of public body," or in other words, economic structure of the arguing members affected each member's respective definition of "public body."<sup>253</sup> This insight is consistent with the capitalist nature and trade-related interests of the United States, as well as the trade interests of China and the hybrid, ambiguous nature of Chinese SOEs. However, comments from the



third-parties' submissions, listed below, in the 2014 public body case offer another layer to this comment with regard to their respective market/NME treatment of China itself.<sup>20</sup>

Party (status given to China)	Comments
Australia (NME)	Australia disagrees that a firm must be “vested with government authority” to be a public body and argues that a firm can have government authority, and thus be a public body, without being “vested with it.”
Brazil (MES)	Government ownership alone does not unequivocally mean that a firm is a public body according to the previous WTO definitions.
Canada (NME)	Canada maintains support for the original definition in DS379, that a firm is a public body if simply “controlled by the government.”
European Union (NME)	<ol style="list-style-type: none"> <li>1. EU argues that China’s rhetoric and word choice in submissions in general are repeatedly ambiguous and hard to interpret.</li> <li>2. The EU also comments that when the USDOC defines a public body to exhibit “the possibility of [government] control through whatever means...is too broad,” as every firm in a given country is subject to taxes and government regulations and thus is subject to indirect control.</li> </ol>
Norway (NME)	Norway notes that the WTO DSM aims to “ensure ‘security and predictability’” in the dispute settlement system, and thus earlier public body definitions should be upheld. Thus, Norway, like Canada, supports the first definition. That said, it also emphasizes, that despite government control being the fundamental criterion for a public body, the terms “government” and “public body” are neither rhetorically synonymous nor conceptually equivalent.
Saudi Arabia (NME)	Saudi Arabia did not support, in terms of value, any of the previous interpretations or arguments involving the definition of a public body. That said, Saudi Arabia did emphasize the AB argument in DS379 that “a public body must possess the ability to compel, command, control or govern a private body. Government ownership or control of an entity is not sufficient to establish that the entity exercises governmental authority, and no other factor is dispositive.”

The European Union comment arguing for a narrower and more stringent definition of public body seems like related to the level of difficulty with which a firm could be designated an NME and more related to a genuine political-economic clarification. In stating that taxation and regulation of firms does not constitute “public body” level control, the E.U. improves the “public body” definition objectively and universally, as all countries tax and regulate their corporations.

<sup>20</sup> All chart data taken from The World Trade Organization, *United States – Countervailing Duty Measures on Certain Products from China: Report of the Panel (Addendum)*, WT/DS437/R.

Aside from the EU comment, the interpretive divide on this issue falls along the lines of the developed-developing nation binary, and by default also falls along the granted MES status vs. retained NME status dyad. The Canadian and Norwegian submissions retain the original, simplistic definition of “public body” and thus retain the simplicity and ease with which a member state could designate a Chinese firm as a public body. Similarly, the Australian submission removes a criterion (“vested” with government authority”) from the proverbial “public body” checklist, thus also easing the process of pinpointing a Chinese public body and protecting against its subsidization.

Brazil’s interpretive notes stand in stark contrast to those of the developed nations mentioned above. Brazil is a member of the BRICS developing countries along with China and already grants China nominal market-economy status. Further, Brazil (along with India) led the developing nation contingent against U.S. and E.U. agricultural subsidies in the early Doha Round, whereas China opted to stay passive and relatively quiet on this issue.<sup>254</sup> Brazil argues that assigning a firm the “public body” definition requires more than a simple determination of government control. In making it more difficult to label a Chinese firm a “public body,” Brazil provides implicit support to Chinese firms, obstructing U.S. or E.U. ability to a) designate a subsidy as prohibited or b) use NME methods (and thus wield higher antidumping duties) against these firms. Saudi Arabia seems slightly more passive and ambivalent than Brazil, but nonetheless is attempts to further convolute the definition of “public body.” Though Saudi Arabia still designated China as an NME, this oil exporter maintains close trade and investment ties with China and, like China, relies on nationalized entities (specifically, its one massive oil company, Saudi Aramco) for economic development.<sup>255</sup> Saudi Arabia’s rhetorical and analytical decisions are indicative of its desires to protect its economic relationship with China as well as to

maintain government support and preferential treatment for Aramco. Especially now, as Saudi Arabia debates offering ownership of certain Aramco assets to Saudi and international stockholders, a protective definition of “public body” could prevent this an Aramco initial public offering (IPO) from jeopardizing the state’s ability to intervene with the company.<sup>256</sup> Thus the language of Saudi Arabia’s claim in 2014 suggests its desire to make it more difficult for WTO members to target subsidization of Aramco in the future.

These interpretive divides on the issues of public bodies, government functions, and the appropriate scope of government between the “market” economies perhaps would not exist in the WTO context if the NMEs were not members. Further, whereas *space* for divergent interpretations may exist within the SCM Agreement provisions regarding public bodies and government control, this ambiguity would not have been brought to light if not for the NMEs, whose economies are affected differently by each new, potential interpretive outcome regarding these provisions. In other words, the WTO legal language on public bodies was already unclear, but China’s participation prompted the discussion about this lack of clarity.

As noted in the 2014 case, both the United States and China agree that “in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, [the AB] emphasized the case-by-case nature of the distortion inquiry.”<sup>257</sup> In other words, no precedential method can be set to determine whether subsidization is causing market distortion basis, nor can one be set for the process of selecting surrogate country pricing information for subsidies cases. The legal volatility surrounding the use of surrogate pricing methods subverts the ability of WTO law, at least with regard to AD/CVD, to become constitutionalized. Precedent is meaningless if each NME subsidies case is unique by definition. NME participation, and specifically that of

China, has therefore undermined the constitutionalization process that Deborah Cass explains in her scholarly forecasts of China in the WTO.

## CHINA AND WTO LEGAL CULTURE, SCOPE, AND INSTITUTIONAL PURPOSE

### 1. EDUCATIONAL INITIATIVES AND A TOP-DOWN APPROACH TO ACCESSION:

Most interviewees who offered opinions of China's view of the WTO emphasized that China itself "instigated the accession process" as it "really wanted to join the WTO."<sup>258</sup> Scholarship generally responds to this phenomenon by considering that China wanted (and even needed) the WTO to realize its intentions of export-oriented economic growth. However, one interviewee offered a less discussed and arguably more interesting interpretation of the Chinese government's enthusiasm towards WTO membership. This specialist considered that China, from the get-go, intended to use WTO membership to "legitimize the political power, authority, and capability of the Communist Party."<sup>259</sup> This interviewee confirmed the author of this thesis' hypothesis that, in order to legitimate the Communist Party and validate the push for WTO accession, the Chinese Government initiated an unprecedented and bizarrely thorough campaign to educate the Chinese populace, especially businesspeople, about trade policy and WTO institutions.<sup>260</sup>

This seems counter-intuitive given the historical political-economic interests of Communist parties. In *The Politics of China's Accession to the World Trade Organization*, Feng (2006) reviews scholarship supporting the position that, with regard to trade liberalization, communist parties historically "block the external message of opportunity to domestic groups who would benefit the most."<sup>261</sup> Generally, international trade politics are centered upon the idea that business executives benefit most from market expansion whereas low-skilled workers lose jobs

and wages to foreign competition. Business leaders do not run the risk of losing their jobs and should thus be excited by the prospect of a larger consumer base created through reduction of trade barriers. In the unique case of pre-accession China, opposition “to the ...bid for WTO membership” came from domestic industry and was championed by the “central decision-making body” in China (the Communist Party elite).<sup>262</sup> The push to join the international economic community, then, involved the non-standard struggle of the Party elite to convince business leaders that WTO membership was worthwhile.

To sell the Chinese business community (and individual people as well) on accession to the WTO, the Communist Party waged an extensive educational campaign to increase public knowledge of WTO functions, institutions, and the implications of membership.<sup>263</sup> While many member countries have Offices for WTO Affairs within their national commerce or trade agencies, China’s internal institutionalization of WTO educational resources, state-to-WTO interactions, and research initiatives to improve WTO strategy was and still is unique. At least three Chinese universities have offered graduate degrees in WTO law since 2002, and Wuhan University’s WTO Studies School, the earliest of such programs, began in 1999.<sup>264</sup> In addition, China allowed foreign governments and international organizations to conduct WTO educational courses in China for CCP officials and businesspeople alike.<sup>265</sup> The Chinese government itself sponsored academic competitions for ordinary citizens to show off their WTO-specific knowledge.<sup>266</sup> Further, the Chinese government established and continues to finance a WTO Accessions Internship Program for young professionals from developing countries to bolster national “brain banks” of WTO knowledge.<sup>267</sup>

From the perspective of Chinese citizens and businesspeople, the educational campaigns and domestic institutional development form a political strategy to bolster trust in the CCP as a

provider of accurate and global information. The Chinese government emphasized the importance of understanding the WTO from the inside out in order to effectively and sophisticatedly perform within the WTO system. Even if Chinese citizens held biased views of WTO membership's normative and economic *implications* for the Chinese people, information about the technical and legal apparatuses of the WTO system in and of themselves was presented to the populace thoroughly, academically, and truthfully. China created its internship program within the WTO itself and allows professionals from other developing countries to join as well. This signals to the WTO membership that China is enthusiastic about integrating into the WTO in good faith and as a sophisticated player. Further, the internationalization of China's internship, as well as the allowance of foreign influences to provide WTO educational services send an important signal to the Chinese populace and business community. China's behaviors signal its commitment to providing internationally verified, and thus arguably truthful, information about the WTO to its people. The CCP certainly does not ensure this level of accuracy or thoroughness in all (or most) cases when presenting information to the citizenry. Arguably, the decision to provide the populace with factual WTO information is both a genuine initiative as well as a political move. On one hand, it ensures that the performance of China, as a monolithic entity, will be based on thorough understanding of WTO rules and norms. Thus China will succeed in the procedural sense, which could lead to China's success in the substantive sense. However, to say that this would help China realize its economic and diplomatic interests assumes that China, as a state member to an international organization, is a monolithic entity whose interests are espoused by the CCP position.

Following this logic, one can see how the CCP's choice to isolate WTO knowledge as one topic on which to provide the populace with correct and thorough information is strategic. The

move buys the CCP future political capital. It allows the CCP to refer back to WTO educational initiatives as an example that supports its image as a functional, globally connected, and accommodating regime. Even more broadly, in choosing international relations as the arena in which to be honest with its citizens, the CCP increases its chances that the Chinese people will feel comfortable with the CCP negotiating with foreign countries on their behalf. The Chinese people have little control over their government's policies, but citizens may remain complacent if they feel economically and internationally secure. Increasing the odds that they feel this way, by giving them a hand in the development of WTO policy, in turn secures the control and perceived legitimacy of the CCP.

## 2. CURRENCY MANIPULATION AND WTO LEGAL BANDWIDTH<sup>21</sup>

Accusations from the international community that China manipulates its currency to gain unfair trading advantages serve to paint China as a nefarious trading partner. Currency manipulation refers to actions taken by a government, often times in a developing country, to devalue its currency relative to the currency of a trading partner, usually in a developed nation. This artificially makes the exports from the manipulating country cheaper in the global market while raising prices on imports.<sup>268</sup> From the U.S. perspective, if a country devalues its currency relative to the dollar, exporting to that country becomes more expensive, meaning it is more expensive to maintain export-oriented jobs like manufacturing positions in the U.S.<sup>269</sup> Manipulative actions include selling excessive amounts of the native currency and buying excessive reserves (bonds and other financial assets) in foreign currencies.<sup>270</sup> To give a country

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<sup>21</sup> Parts of this subsection appear in a paper on the Trans-Pacific Partnership written by the author of this thesis in April 2015. Though this work is not published verbatim or in a long form piece, a condensed and rephrased version of this work is published in the Penn Journal of Economics.

case example, Bergsten and Gagnon (2012) at the Peterson Institute for International Economics note that recent currency manipulation from 20 countries has cost the United States between 1 and 5 million jobs and while increasing the U.S. trade deficit by between \$200 and \$500 billion.<sup>271</sup>

Establishing practical and enforceable currency manipulation controls against China may be impossible because “proving the existence and extent of currency misalignment...has proven enormously difficult.”<sup>272</sup> In other words, it is difficult to distinguish between deliberate currency manipulation and indirect fluctuation resulting from legitimate domestic policy decisions.<sup>273</sup> The International Monetary Fund (IMF) articles and the World Trade Organization charter both attempt to define and prohibit currency manipulation.<sup>274</sup> However, respective restrictions on “chang[ing]...the par value of...currency except to correct [for] fundamental disequilibrium” and providing a “subsidy to exports” have not prevented Chinese (and others’) currency interventions that negatively affect the U.S. economy.<sup>275</sup> The IMF prohibits manipulations that do not address a “fundamental disequilibrium” in exchange rates. However, determining whether or not a currency intervention policy corrects “disequilibrium” is difficult due to the inability of economists to “pin down the equilibrium [exchange] rate”.<sup>276</sup> Economists do not agree on which of the multiple economic models available to measure currency manipulation and misalignment is most effective. Therefore, economists cannot accurately determine the extent to which China manipulates its currency. Estimates vary from a 49% undervaluation to a 100% overvaluation of the RMB.<sup>277</sup>

Though neither the WTO nor the IMF offers comprehensive enough descriptions of and protections against currency manipulation, the IMF definition and existent surveillance capabilities are certainly more sophisticated than the analogous provisions available in WTO



treaties. Article IV of the IMF Agreement establishes that “avoid[ing] manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain unfair competitive advantage over other members” as a “general obligation” of IMF members.<sup>278</sup> This seems like an explanation for currency manipulation, and of course, the IMF is an organization devoted to the regulation and oversight of international monetary policies whereas the WTO is an organization established to lower international barriers to trade. Given these descriptions, one would expect the IMF to take the reigns on issues regarding currency manipulation, as this topic seems to exist outside of the WTO purview. However, as trade becomes increasingly liberalized, currency manipulation becomes more and more of a trade-related concern. The IMF general obligations section asserts that currency manipulation is a direct cause of “unfair competitive advantage,” thus pinpointing currency manipulation as a trade issue, and the introductory IMF Articles direct the IMF to “facilitate the expansion and balances growth of international trade.”<sup>279</sup> That said, scholarship shows that the IMF practical capacity to enforce its rules, usually through making loans to countries conditional upon compliance with IMF rules, lags behind the practical enforcement capacity behind the WTO DSM rulings and negotiated agreements. Chorev and Babb (2008) explain that the IMF cannot demand compliance and maintain the conditionality of its loans when a) countries have access to significant amounts of private capital and b) when the IMF “engages in ‘defensive lending.’” Essentially, once the IMF has provided capital to a country, it becomes invested in ensuring the success of the country “to preserve its own international image.” Thus, the IMF is unlikely to follow through on conditionality threats and might even “provide new loans so that the government can pay off old ones” to keep up the perceptiveness that the IMF is effective.<sup>280</sup>

On the other hand, the WTO's effectiveness does not rely on an external factor (private capital), nor does it rely on how the WTO manages some internal resource (i.e. loans within the IMF). Rather, WTO membership and compliance with the rules provide countries with a privilege that they already have the capacity to facilitate all on their own: the reduction of technical and domestically codified trade barriers.<sup>281</sup> Unlike the IMF, it is advantageous for a country to adhere to the WTO regardless of its economic performance because all countries want to realize gains from trade, and "all successful nations are trading nations" in the globalized economy.<sup>282</sup> Further, it would always be disadvantageous for existing members leave the WTO because then WTO members could discriminate against them in trade. The stakes of WTO entry or WTO exit do not change with the availability of a resource left uncontrollable by the WTO. The WTO is considerably more removed than the IMF from the problem of "resource leveraging" and seems more structurally resilient, sound, and stable. This assessment and its potentially implementable implications become important especially as China becomes a more active and consequential player in international trade. China, often criticized as the world's worst currency manipulator, has exposed the shortcomings of the WTO legal system in handling currency manipulation-related issues. However, this shortcoming is avoidable, given the rigidity of the MFN principle and the WTO's function as a moderator, but not controller, of resources in international trade.

### 3. WTO MEMBERSHIP AND POLITICAL-ECONOMIC "CONVERGENCE":

The method of expert testimony collection and synthesis used in this project allows for a nuanced rhetorical analysis of the language used by specialists in the field to discuss China as a player in the multilateral trading system. One interviewee with the greatest amount of China-

specific trade law knowledge repeatedly referred to December 2016 as the moment of China's potential "graduation" to market-economy status.<sup>283</sup> This offers some initial insight into how certain international trade lawyers understand Chinese transition to MES as a progressive rite-of-passage, or a development indicative of China's political-economic maturation. Teleological language of "graduation" implicitly characterizes the WTO as a capitalism-advocating and ideologically unwavering organization. In a word, the WTO's vision of ideal political economy is ideal and countries become true members of the international economic community when they embody said ideals. This may in fact be the view underlying usage of the term "graduation." This language implies a subjective and moral preference towards capitalist orientation, but whether capitalism is moralized here or not, scholars from other countries engaged in trade with China still emphasize that China joined the WTO "in order to transform itself into a market economy."<sup>284</sup> However, some Chinese scholars believe that China never intended to "graduate" within the WTO system in the first place. Hsieh (2010) argues that China's constitutionalized call for "socialism with Chinese characteristics" as the country progressed with economic reform and opening implies that China intended to use WTO membership to "participate in global trade to strengthen Chinese socialism rather than succumb to Western ideology."<sup>285</sup>

The last interview subject (an American lawyer) emphasized that China's accession to the WTO and subsequent implementation of internal economic and organizational reforms stipulated within the Protocol represented a process of "convergence" necessary to join the WTO.<sup>286</sup> In fact, this subject argued that the point of the WTO system was to "force convergence."<sup>287</sup> This suggests that the WTO system was never meant to welcome or even accommodate political-economic diversity among its members, and thus in joining the WTO, China should have (and indeed may have) recognized its imminent development into a capitalist economy. In the same

interview, though, this subject adamantly insisted that the WTO “does not penalize countries for different political economic structures.”<sup>288</sup> She backs up this claim by noting that the WTO “creates a set of uniform rules” to govern use of dispute settlement, facilitate negotiations for trade liberalization, ensure a “predictable” international trade arena, and protect countries from the discriminatory trading practices of others.<sup>289</sup> According to this interviewee, the system does not allow for non-market economies to bear disproportionate burdens. Her view suggests that the Safeguard and NME methodologies are corrective methods that have, both in practice and conceptually, brought NMEs in line with the rest of the pack. This would make sense if the most important bearer of these policies, China, was still unequivocally and wholly an NME. As this thesis shows in its literature review, now it is not and, at least as long as it has been a member in the WTO, perhaps never was. The problem then is not that the WTO-plus rules are inherently discriminatory but that the discrepancy between their intended target and the political-economic facts-on-the-ground in China create a space in which China receives inappropriate treatment.

## SECTION VIII: CONCLUDING THOUGHTS

Cass, Jackson, Bown, and others believed that China’s participation in the WTO would forever alter the organization’s institutions and norms and that such alteration would be negative. They projected that China’s participation as a large and powerful developing country, as a non-market economy, and as a country lacking economic and political transparency would contribute to the de-legitimization of WTO juridical channels, the ineffectuality of multilateral negotiations, and a decline in members’ view of the WTO as respectable and sophisticated. To some extent, their predictions hold true. That said, this thesis suggests that in the Doha Round and in the arena of dispute settlement and trade remedies, China cannot be blamed for proactively undermining

force of the WTO system. In Doha, China behaved in a manner that should be expected of a large developing nation and a country that made significant concessions (or perceived itself to have made significant concessions) in its accession process. With regard to trade remedies cases and dispute settlement, China exhibited respect for the system and a desire to participate in the WTO's best institution with sophistication. Though the aforementioned scholars are certainly "onto something," so to speak, with regard to the degradation of evidentiary standards and the questionable uses and methods of NME AD methodologies, the problem lies not in the intra-DSM behavior of China, but in the details and application of these rules themselves. WTO members create the NME rules with genuine intentions to make China's WTO participation fair, safe, and functional. Still, the problem is not China cheating this system of rules and requirements, but that the rules no longer apply uniformly to the Chinese economic situation. China's negative effect on the DSM exists because China's participation, however benign or standard, illuminated the unpreparedness of the multilateral trading system to handle political-economic diversity and political-economic ambiguity of membership. In one arena, that of currency manipulation, China exhibits proactive, deleterious behaviors that suggest a need for improvement within the WTO institutions and rules. The academic community's attempt to address this shortcoming might lead to a future in which Bretton Woods institutions are synthesized and reformatted into a set of multipurpose organizations better equipped to target real-world economic problems and incentivize sovereign nations to mitigate these problems.

As this thesis shows, China's participation has strengthened certain institutions and norms in the WTO system. The Chinese narrative of arduously gained sophistication and institutional insight supports Keohane's view that the ins-and-outs of the WTO system are in fact worth learning or at least necessary to learn to survive in the contemporary world. Further,

China's compliance with WTO rulings supports the idea that, even if the DSM cannot handle political economy diversity its membership (including China) is working towards a point in which it can. Last, whether China is "converging" asymptotically towards capitalism or intent on "graduating" as a fully transparent and marketized country, the fact remains that China has lived up to many of its accession commitments, including tariff reduction and increased privatization. It shows that China understands that its "admittance to the club" is conditional and economically worthwhile. China's non-capitalist and non-Western characteristics suggest that it would undermine a Westernized organization devoted to the "global capitalist system," and thus its lack of an unequivocally deleterious effect the WTO seems surprising at first glance.<sup>290</sup> But "China needs the WTO" in the long-term, so much so that that phrase was a pervasive Chinese saying in the accession lead-up.<sup>291</sup> It is not that the WTO caused China to marketize, but rather, that China would have marketized anyway and the WTO is the natural place for a marketizing or marketized country to interact with the rest of the international community.

This survey and new research can support international trade litigators as they prepare to revisit the controversial NME label at the WTO this December. As mentioned in the literature review, Urdinez and Masiero projected one quantitative effect of NME status on the dispute settlement system, namely that market economy status would lower "the number of anti-dumping investigations against Chinese products."<sup>292</sup> However, the economics on the ground in China would not change as the result of this in-name switch to market economy. As this thesis suggests NME status is politically motivated and serves more so as a protectionist tool to keep certain Western industries afloat in the midst of increased importation of Chinese goods. It does show, though, that the steel industry still deserves the drastic and methodologically separate system that is the AD NME classification.

Some lawyers are, in the months leading up to this reassessment of NME status, stitching together arguments as to why China as a whole should retain NME classification. Though a point entirely political in nature, keeping the status quo would not undermine China's respect for the WTO itself, as China has shown its commitment to the system despite the inability of the system to handle its political-economic idiosyncrasies. With or without NME status, the world's second largest economy will continue to revere the WTO and contribute to it in an educated and sophisticated manner.<sup>293</sup> Perhaps China's participation in the WTO marks the beginning of an era in which those that join new international systems are motivated by what the international system can do, as it stands, to further the country's interests rather than how the country can manipulate the international system for the advancement of said interests.

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